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THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN THE ARIZONA TAX COURT

State of Arizona, ex rel. Mark Brnovich, Attorney General, Plaintiff, v. Arizona Board of Regents, Defendant,	No. TX2019-000011 MOTION TO DISMISS NUMBER 3 (COUNT I UNLAWFULLY REQUESTS THAT TAX-EXEMPT STATE PROPERTY BE TAXED) (Assigned to the Hon. Christopher Whitten)
Paul D. Petersen, in his official capacity as Maricopa County Assessor, and Royce T. Flora, in his official capacity as Maricopa County Treasurer, Relief-Defendants.	

1 **MOTION**

2 Pursuant to Arizona Rules of Civil Procedure 12(b)(6) and 12(c), the Arizona
3 Board of Regents (“the Board”) moves to dismiss count I of the Attorney General’s
4 (“AG”) complaint on the grounds that he cannot lawfully request that tax-exempt state
5 property be taxed for the reasons set forth in the memorandum below.

6 **MEMORANDUM**

7 Even if the AG had the statutory authority to sue the Board (which he does not, as
8 shown in Motion to Dismiss Number 1 (AG’s Lack of Authority)), he cannot force the
9 taxing authorities to assess and collect property taxes against tax-exempt state property.
10 The AG alleges that a proposed transaction in which the Board would lease land that it
11 owns now—and has owned for over 35 years—to Omni Tempe, LLC (“Omni”) for
12 building and operating a hotel and conference center near ASU’s main campus would
13 violate article IX, section 2(12) of the Arizona Constitution and A.R.S. § 15-1625(B)(4).
14 [Compl. ¶¶ 60–66, 81–82, 98–101, 110–12]. But even if the transaction is ultimately
15 closed, the lease is executed, and the hotel and conference center is built, the Board will
16 continue owning the property as it has for decades. Because the Board is a state entity and
17 because article IX, section 2(1) of the Arizona Constitution and A.R.S. § 42-11102(A)
18 exempt state property from taxation, the taxing authorities cannot impose property taxes
19 against the Board. As a result, the Court should dismiss count I of the AG’s complaint.

20 **ARGUMENT**

21 **A. The Board’s property is state property and is exempt from taxation.**

22 The Arizona Constitution exempts all state property from taxation. *See* Ariz.
23 Const. art. IX, § 2(1); A.R.S. § 42-11102(A). The Board is a “constitutionally mandated
24 body, . . . fulfilling a constitutionally mandated function, [that] includes . . . the
25 supervision of the state universities.” *Ariz. Bd. of Regents v. State Dep’t of Admin.*, 151
26 Ariz. 450, 451, 728 P.2d 669, 670 (App. 1986); *see also* Ariz. Const. art. XI, § 1(A)

1 (requiring the Legislature to establish and maintain “a general and uniform public school
2 system” that includes “[u]niversities”); Ariz. Const. art. XI, § 2 (providing for “such
3 governing boards for the state institutions as may be provided by law”); Ariz. Const. art.
4 XI, § 5 (identifying the “regents of the university” as a governing board).

5 Consistent with the Board’s constitutional authority and its role as a public
6 corporate body with “jurisdiction and control” over Arizona’s public universities, A.R.S.
7 § 15-1625(A), courts have routinely and uniformly determined that the Board is a state
8 entity for purposes of the tax exemption provisions. *See City of Tempe v. Del E. Webb*
9 *Corp.*, 13 Ariz. App. 597, 598, 480 P.2d 18, 19 (1971) (providing that the Board “is a
10 state agency and therefore exempt from taxation”); *City of Tempe v. Ariz. Bd. of Regents*,
11 11 Ariz. App. 24, 25, 461 P.2d 503, 504 (1969) (similar); *cf. Univ. Med. Ctr. Corp. v.*
12 *Dep’t of Revenue*, 201 Ariz. 447, 452 ¶ 22 n.5, 36 P.3d 1217, 1222 n.5 (App. 2001)
13 (noting that “hospital property” that the Board owned and operated as a hospital for many
14 years “has *always* been treated as automatically exempt from property taxation under
15 Article 9, Section 2(1) of the Arizona Constitution as state property”) (emphasis added).

16 In other contexts, courts have likewise consistently concluded that the Board is a
17 state entity. *See Ariz. Students’ Ass’n v. Ariz. Bd. of Regents*, 824 F.3d 858, 864 (9th Cir.
18 2016) (describing the Board as “an arm of the State of Arizona” and noting that “the State
19 of Arizona treats [the Board] as a division of the State under Arizona law”); *Daniel v. Am.*
20 *Bd. of Emergency Med.*, 237 F. Supp. 2d 336, 357 (W.D.N.Y. 2002) (observing that the
21 Board is “a branch of Arizona’s state government”); *Bd. of Regents of Univs. & State*
22 *Coll. v. City of Tempe*, 88 Ariz. 299, 305, 356 P.2d 399, 403 (1960) (stating that it is
23 “perfectly clear” that the Board “may, *for all purposes*, be classified as a public agency of
24 the State rather than a private corporation”) (emphasis added); *Kaman Aerospace Corp. v.*
25 *Ariz. Bd. of Regents*, 217 Ariz. 148, 153 ¶ 20, 171 P.3d 599, 604 (App. 2007) (concluding
26 that the Board “is a state agency”); *Associated Students of Univ. of Ariz. v. Ariz. Bd. of*

1 *Regents*, 120 Ariz. 100, 103, 584 P.2d 564, 567 (App. 1978) (same); *Ariz. Bd. of Regents*
2 *v. Zappia*, 118 Ariz. 449, 452, 577 P.2d 735, 738 (App. 1978) (same).¹

3 This unbroken line of authority compels the conclusion that the Board is a state
4 entity for purposes of the relevant tax exemption provisions. The Board’s property is
5 therefore exempt from taxation.

6 **B. The Board currently owns the property that is the subject of the**
7 **proposed Omni transaction and will continue to own the property after**
8 **the transaction is closed.**

9 The Board, on behalf of ASU, purchased the property that is the subject of the
10 planned Omni transaction in November 1983—over 35 years ago. *See* November 21,
11 1983 Sale Agreement (documenting the Board’s purchase of the property), attached as
12 Exhibit A; November 21, 1983 Assignment of Leases (assigning then-existing leases to
13 the Board), attached as Exhibit B; November 21, 1983 Warranty Deed (transferring
14 property title to the Board), attached as Exhibit C.² The Board still currently owns that
15 property on behalf of ASU. *See* January 11, 2018 Development Agreement between the
16 City of Tempe and Omni (identifying the Board as the owner of the property), attached as
17 Exhibit D.³ And even if the Board executes the challenged leasing transaction with Omni,

18 ¹ Even more, the AG recently argued that the Board “is not an independent
19 corporation but is an arm of the State under the Governor and the Legislature’s control.”
20 *See* Answering Br., *Ansel Adams Publ’g Rights Tr. v. PRS Media Partners, LLC*, 502 F.
21 App’x 659 (9th Cir. 2012) (No. 11-16120), 2011 WL 7006718, at *5.

22 ² A court may take judicial notice of facts that “can be accurately and readily
23 determined from sources whose accuracy cannot reasonably be questioned,” such as the
24 existence of public records. Ariz. R. Evid. 201(b); *see also Strategic Dev. & Constr., Inc.*
25 *v. 7th & Roosevelt Partners, LLC*, 224 Ariz. 60, 64 ¶ 13, 226 P.3d 1046, 1050 (App.
26 2010) (“[A] Rule 12(b)(6) motion that presents a document that is a matter of public
record need not be treated as a motion for summary judgment.”).

³ In addition to the allegations in the AG’s complaint and the existence of public
records, Rule 12(b) permits a court to consider “matters that, although not appended to the
complaint, are central to the complaint.” *Strategic Dev. & Constr.*, 224 Ariz. at 64 ¶ 14,
226 P.3d at 1050; *see also id.* (considering the content of a lien contract that was referred

1 the AG concedes that the Board will still own that property. [Compl. ¶ 66 (alleging that,
2 should the Board execute the leasing arrangement with Omni, “ASU would act as landlord
3 and Omni would agree to construct improvements to the property”)]. In other words, the
4 Board has owned the property that is the subject of the pending Omni transaction for more
5 than three decades and will continue owning it regardless of whether the Omni transaction
6 closes, the leasing arrangement is executed, or the hotel and conference center are built.

7 Moreover, even if the AG’s claims did not raise non-justiciable political questions
8 (which they do, for the reasons set forth in Motion to Dismiss Number 4 (Counts II and III
9 Present Non-Justiciable Political Questions)), the Board’s authority under A.R.S. § 15-
10 1625(B)(4) is clear. The Board is authorized to “[p]urchase, receive, hold, make and take
11 leases and long-term leases of and sell real and personal property *for the benefit of this*
12 *state and for the use of the institutions under its jurisdiction.*” A.R.S. § 15-1625(B)(4)
13 (emphasis added). Under the statute, there is no rational basis upon which this Court
14 could conclude that any term in the proposed leasing transaction is a conveyance to
15 “evade taxation” for purposes of article IX, section 2(12) of the Arizona Constitution. As
16 noted above, the Board has owned this property for multiple decades, and the property has
17 been exempt from taxation throughout that period. Regardless of whether the Omni
18 transaction is executed, therefore, this property has been and will continue to be state
19 property that is exempt from taxation. There are no property taxes to “evade,” and there
20 never will be so long as the Board owns this property. *See, e.g., Del E. Webb*, 13 Ariz.
21 App. at 598, 480 P.2d at 19.

22 **ATTORNEY FEES NOTICE**

23 The Board requests reasonable attorney fees as the successful party in this action
24 under A.R.S. § 12-348.01.

25 _____
26 to in the complaint but was not attached). The AG refers to the Development Agreement
multiple times in his complaint. [Compl. ¶¶ 64–66].

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CONCLUSION

The AG cannot force the Maricopa County Assessor and the Maricopa County Treasurer to assess and collect property taxes against the Board’s tax-exempt state property. Because the Board currently owns the property that is the subject of the Omni transaction and will continue to own that property regardless of whether the Omni transaction is ultimately closed, the property is and will continue to be exempt from taxation. As such, the Court should dismiss count I of the AG’s complaint.

Dated: March 8, 2019

PERKINS COIE LLP

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*Attorneys for Defendant
Arizona Board of Regents*

1 E-filed with the Court this March 8, 2019
2 and copies emailed this same date to:

3 Mark Brnovich, Attorney General
4 Brunn W. Roysden III, Assistant Attorney General
5 2005 N. Central Avenue
6 Phoenix, AZ 85004
7 Beau.roysden@azag.gov

8 /s/ Susan Carnall

143344467.4

Exhibit A

Unofficial
Document

When recorded return to:
Lawyers Title of Arizona
Collection Dept
181,080 CLC

AGREEMENT

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AGREEMENT

THIS AGREEMENT entered into in triplicate November 21, 1983, between TEMPE SHOPPING CENTER, INC., an Arizona corporation, as Seller, and THE ARIZONA BOARD OF REGENTS, for and on behalf of Arizona State University, as Buyer.

W I T N E S S E T H :

That Seller, in consideration of the covenants and agreements of Buyer hereinafter contained, agrees to sell and convey unto Buyer, and Buyer agrees to buy, all that certain real property, together with all and singular the rights and appurtenances thereto in anywise belonging, including without limitation all of Seller's right, title and interest in the various lease agreements pertaining to said real property, situate in the County of Maricopa, State of Arizona, described as follows, to-wit:

THAT PART of the North half of the Northwest quarter of Section Twenty-two (22), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being known as Block Twenty-two (22) and Twenty-seven (27), of GAGE ADDITION, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 58, being described as all premises lying South of the south line of 8th Street and North of the North line of 10th Street lying West of the West line of Myrtle Avenue and East of the East line of Mill Avenue, City of Tempe, Arizona,

for the sum of FIVE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$5,500,000.00) lawful money of the United States, and Buyer agrees in consideration of the premises to pay the sum of ONE MILLION FIVE HUNDRED THOUSAND DOLLARS (\$1,500,000.00) upon execution of this Agreement, the receipt of which is hereby acknowledged by Seller and to pay the remaining balance of \$4,000,000.00 as follows:

1. \$864,061.78 to be paid by Buyer to the Collection Agent for the benefit of Seller, being that portion of the remaining balance evidenced by a promissory note between Seller as payor, and the Connecticut Mutual Life Insurance Company, a Connecticut corporation, as payee, dated August 30, 1978, in

Recorded in official records of Maricopa County, Arizona

DATE NOV 21 1983 - 12 15 FEE 11.60 PGS 11
BILL HENRY, COUNTY RECORDER 16

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the original principal amount of \$1,160,000.00, secured by a deed of trust of record with a principal balance remaining of approximately \$ 864,061.78 (hereinafter referred to as "Primary Debt"). Payment of the Primary Debt shall remain the obligation of Seller. The unpaid principal balance of the Primary Debt shall accrue interest at the rate of twelve percent (12%) per annum from the date of this agreement and shall be payable to the Collection Agent for the benefit of Seller in monthly installments of \$ 13,921.95 beginning November 20, 1983 and continuing on the 20th day of each month thereafter, and if not sooner paid, the entire balance of the accrued interest and principal of the "Primary Debt" shall be due and payable on or before February 20, 1988. Interest shall be first deducted from each monthly installment and the balance to be applied upon the principal. The principal and interest installments provided for in this portion of this agreement for sale are intended to coincide Unofficial Document and be payable in accordance with the terms and conditions of the Primary Debt. To the extent the principal and interest installment payments provided for in this paragraph 1 are in excess of the principal and interest installments due under the Primary Debt, Collection Agent shall pay said excess to the Seller.

2. \$ 3,135,938.22 to be paid by Buyer to Collection Agent for the benefit of Seller and said amount shall accrue interest on the unpaid principal balance at the rate of twelve percent (12%) per annum from the date of this agreement. This portion of the principal balance shall be payable in ten (10) equal annual installments of \$ 313,593.82, beginning July 1, 1984 and continuing on the first day of July each year thereafter until paid in full. Interest on this portion of the principal balance shall be payable annually in addition to and on the same dates as the principal payments described in this paragraph 2.

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3. Wrap-Around Agreement; Prior Indebtedness. This agreement for sale is a wrap-around agreement and the deferred principal balance herein of \$4,000,000.00 described above includes the unpaid principal balance payable under the Primary Debt. As long as the Buyer is not in default with respect to payments due under this agreement, the Seller shall be obligated to make all payments when due on the Primary Debt pursuant to the terms and conditions of the Collection Agreement executed concurrently herewith as set forth in paragraph 5 herein. In the event Collection Agent fails to make any payments on the Primary Debt when due, or in the event the Collection Agreement is rescinded, breached or voided, and the parties fail to enter into another materially acceptable collection agreement, the Buyer shall have the option, but not the obligation, to: (1) make such Primary Debt payments directly to the respective holder of the Primary Debt, and may deduct the amount of each payment thereof from the next Unofficial Document installment(s) or payment(s) due under this agreement, or (2) pay the monthly payments under this agreement directly to the Seller. In the event the Buyer elect to make direct payment of the Primary Debt, the Buyer shall obtain receipts of such payments and deliver said receipts to the Seller evidencing payment(s) on said Primary Debt. In the event the Buyer elects to pay the installments due on this agreement directly to the Seller, and so long as the Buyer is not in default with respect to payments due under this agreement, the Seller shall be obligated to make all payments when due on the Primary Debt, and the Seller shall indemnify and hold the Buyer, its successors and assigns, harmless from and against all losses, liabilities, costs, fees (including reasonable attorney's fees), expenses or claims which the Buyer may incur by reason of the Seller's failure to make such payments on the Primary Debt when due, unless such nonpayment shall be by reason of the Buyer's default hereunder. At such time as the portion of this agreement described in paragraph 1 of this Agreement for Sale is paid in

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full, the Seller shall obtain a release of record of the Primary Debt against the real property encumbered thereby and described therein and deliver said release to the Buyer.

4. Default. If:

(a) There is any default in the payment of principal or interest due hereunder, which default has not been cured within 30 days after written notice thereof has been received by Buyer; or

(b) There is any failure to perform any of Buyer's obligations (other than the payment of principal or interest of this agreement) under this agreement, and such failure has not been cured within 30 days after written notice thereof has been received by Buyer;

then, after such cure period, Buyer shall be in default (an "Event of Default") and thereafter interest on the unpaid portion of principal described in paragraphs 1 and 2 of this Agreement for Sale shall accrue at the rate of fourteen percent (14%) per annum until such time as the default is cured.

Notices under this paragraph shall be deemed received: (1) upon actual receipt of notice if hand delivered and receipted for, or (2) 48 hours after postmark of certified mail if notice is mailed by certified mail, postage prepaid, return receipt requested, if to the Buyer: c/o William Phelps, Associate Vice President for Business Affairs, Arizona State University, Tempe, Arizona 85257, if to the Seller: c/o Milton Sechrist, 1010 W. South Mountain, Phoenix, Arizona 85041, or such other address as the parties may, from time to time, designate.

Should an Event of Default occur and thereafter not be cured, Seller may, at its election, enforce any and all remedies available to Seller hereunder at law or in equity, including without limitation declaring the entire remaining unpaid principal balance hereunder to be immediately due and payable and/or enforce a foreclosure or a forfeiture of the interest of Buyer, in the manner provided by law, in which event, upon the

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enforcement of such foreclosure or forfeiture, Buyer shall forfeit any and all rights and interests hereunder in and to the real property hereinbefore described and appurtenances, and Buyer shall surrender to Seller, forthwith, peaceable possession of said property, and shall forfeit to Seller as liquidated damages any and all payments made hereunder, together with any and all improvements placed on or in said property. For purposes of allowing Seller to enforce a foreclosure or forfeiture of Buyer's interest, the statutory time periods for said forfeiture shall begin to run after the cure period described above and on the day an Event of Default has occurred.

Notwithstanding any other provision contained herein, in the event that any one or more of the Events of Default specified in this Section 4 shall have occurred, the Seller expressly acknowledges and agrees that the Arizona Board of Regents as Buyer herein shall Unofficial Document not have any personal or continuing liability for the payment of the monetary obligations created herein, and that the Seller shall not be entitled to obtain a deficiency judgment against the Buyer.

5. Collection Agreement. The parties hereto agree to execute concurrently with this agreement a Collection Agreement in the form and style generally used by Lawyers Title of Arizona, which agreement together with all of the representations, duties and obligations therein and exhibits attached thereto shall be an integral part of this agreement.

6. Prepayments. The purchase price or any portion thereof may be prepaid in part or in full at any time without penalty. However, with respect to any prepayment of the principal balance of the portion of this agreement described in paragraph 1 of this Agreement for Sale, the Buyer shall pay to the Seller, at the time of any such prepayment, a prepayment penalty in an amount equal to the prepayment penalty, if any,

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required to be paid on the Primary Debt as a result of the Buyer prepaying in part or in full the Primary Debt.

7. Buyer acknowledges and agrees that the payments to be made by the Buyer shall be made to Collection Agent and that Collection Agent shall use such payments to pay, as they become due, the amounts due and payable on the Primary Debt, and, in addition to payments of principal and interest hereon, Buyer shall make all impound payments required to be made to the holder of the Primary Debt (until such Primary Debt has been paid in full), and Buyer shall, in addition to all principal and interest payments due hereunder, pay to Collection Agent all amounts necessary to make such impound payments. Buyer acknowledges and agrees that it shall be jointly responsible with Seller for seeing that all payments made by it to Collection Agent for principal, interest and impounds on the Primary Debt are in turn made by Collection Agent to the holder of the Primary Debt.

8. As additional security, Buyer hereby gives to and confers upon Seller the right, power and authority during the continuance of this agreement to collect the property income, reserving to Buyer the right, prior to the occurrence of any Event of Default, to collect and retain such property income as it becomes due and payable. Upon the occurrence of any Event of Default, Seller may at any time, without notice, either in person, by agent or by a receiver to be appointed by the court, and without regard to the adequacy of any security for Buyer's obligations to Seller hereunder, enter upon and take possession of the property herein described or any part thereof, in Seller's own name sue for or otherwise collect such property income, including that past due and unpaid, and apply the same, less costs and expenses of operation and collection, including reasonable attorney's fees, upon Buyer's obligation to Seller hereunder, and in such order as Seller may determine. The

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entering upon and taking possession of the property herein described, the collection of such property income, and the application thereof as aforesaid shall not cure or waive any default or notice of declaration hereunder or invalidate any act during procedure to such notice or declaration.

9. Buyer shall pay before they become delinquent all installments of principal and interest, not delinquent at the date hereof, of special improvement liens against said property, if any, and all taxes and assessments on said property, levied subsequent to December 31, 1983, together with all assessments and other charges of the Salt River Valley Water Users' Association not delinquent at the date hereof, and all other assessments and charges for or on account of irrigation water or power used for furnishing irrigation water, after the date hereof, and Buyer shall keep the buildings erected and to be erected upon said property insured against fire in the amount of the reasonable insurable value, however, such reasonable insurable value shall, in no event, be less than the remaining unpaid balance due from Buyer under this agreement. Buyer shall maintain such insurance through the Arizona State Risk Management Division, which coverage may include coverage through the State of Arizona self-insurance program. In the event that insurance coverage is provided in accordance with the State of Arizona self-insurance program, such self-insurance coverage shall name Seller and Connecticut Mutual Life Insurance Company as additional loss payees. The Buyer agrees to assume all risk of damage to any improvements upon the premises, or of the taking of any part of the property for public use; that no such damage or taking shall constitute a failure of consideration, but in case of such damage or taking, all monies received by the Seller by reason thereof shall be applied as payment on account of the purchase price of the property, less any sums of money which the Seller may be required to expend in procuring such money, or at the election

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of the Seller, to the rebuilding or restoration of such improvements.

10. If Buyer fails to pay any such taxes, charges, assessments or premiums for fire insurance or fails to pay any amount due upon or fails to perform any condition or covenant of any agreement for sale or mortgage required of Buyer, before the same shall have become delinquent, Seller shall have the right to pay or procure the same, together with necessary costs and legal fees, and the amounts so advanced and such repayment thereof shall be secured hereby and shall be repaid to Seller by Buyer on demand, together with interest thereon at fourteen percent (14%) per annum from date advanced by Seller until repaid, and any payments so made by Seller shall be prima facie evidence of the necessity therefor. If Lawyers Title of Arizona is notified in writing by Seller of any such advances, it shall not deliver the warranty deed to Buyer until repayment thereof with interest shall have been made.

11. If Seller institutes suit against Buyer to enforce Seller's rights under this agreement and obtains valid judgment against Buyer, Buyer agrees to pay all costs, expenses and attorney's fees of Seller.

12. The Warranty Deed of Seller conveying the herein described property to Buyer, subject to the liens, encumbrances, reservations, restrictions and exceptions affecting the title to said property, has been delivered in escrow with Lawyers Title of Arizona and shall be delivered to Buyer only upon fulfillment of all of Buyer's obligation hereunder.

13. Buyer may enter into possession of said property and continue in such possession for and during the life of this agreement. Buyer agrees to maintain said premises and all improvements thereon in good repair, to permit no waste

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thereto, and to take the same care thereof that a prudent owner would take.

14. No transfer or assignment of any rights hereunder shall be made by anyone having an interest herein, unless made in such manner and accompanied by such deeds and other instruments as shall be required by Lawyers Title of Arizona nor until its regular escrow fee and other costs including its charge for the issuance of a new title insurance policy shall have been fully paid, and all instruments deposited in escrow with it.

15. Seller and Buyer, and each of them, promise to pay promptly, and to indemnify and hold harmless escrow agent against all costs, damages, attorney's fees, expenses and liabilities which, in good faith and without fault on its part, it may incur or sustain in connection with this agreement and in connection with any court Unofficial Document action arising out of this agreement.

16. Time is of the essence in the performance of each and every obligation herein imposed. This agreement shall be construed according to its fair meaning and neither for nor against either party hereto, under the laws of the State of Arizona. This agreement constitutes the entire agreement between the parties hereto with respect to the subject matter hereof and all prior understandings, written or oral, express or implied, with respect to the subject matter hereof, shall be deemed merged herein. This agreement may not be amended or modified except by a document in writing signed by the party to be charged therewith. In the event any provision hereof or any portion of any provision hereof shall be deemed to be invalid, illegal or unenforceable, such invalidity, illegality or unenforceability shall not affect the remaining portion of any provision, or any other provisions hereof, as each provision of

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this agreement shall be deemed to be severable from all other provisions hereof. The waiver by any party hereto of any right granted to it hereunder shall not be deemed to be a waiver of any other right granted herein, nor shall same be deemed to be a waiver of a subsequent right obtained by reason of the continuation of any matter previously waived. The use of the masculine, feminine or neuter shall be deemed to include the others when the sense requires; and the use of the singular or plural shall be deemed to include the other when the sense requires. Paragraph headings are inserted herein for convenience only and shall not limit the content of any paragraph. This agreement shall be binding on the heirs, administrators, successors, and assigns of the respective parties hereto.

17. Attorney's Fees. Subject to any contrary provisions of this agreement, in the event ^{Unofficial Document} it should become necessary for either party to this agreement to hire an attorney or bring any legal action in connection with the enforcement of any of the terms and provisions of this agreement, then such party as is found to have violated any provisions hereof or is in default hereunder shall pay, in addition to any other sums as such party may be required to pay, attorneys fees in a reasonable amount to such party hiring such attorney or bringing such action, and all costs and expenses incurred in connection with such attorney, including but not limited to expert witness fees, costs of tests and analysis, travel and accomodation expenses, deposition and trial transcript copies, court costs and jury fees.

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IN WITNESS WHEREOF, the parties have executed this agreement on the day and year first above written.

SELLER:

TEMPE SHOPPING CENTER, INC.,
an Arizona corporation

BUYER:

THE ARIZONA BOARD OF REGENTS
for and on behalf of Arizona
State University

By Charles M. Sechrist
Its President

By Victor Zafra
Its Vice President for Business Affairs

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 21st day of November, 1983 by Charles M. Sechrist, the President of TEMPE SHOPPING CENTER, INC., an Arizona corporation, on behalf of the corporation.

Charles J. Cook
Notary Public

My Commission Expires:

October 5, 1985

Unofficial Document

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 21st day of November, 1983 by Victor Zafra, the Vice President for Business Affairs of THE ARIZONA BOARD OF REGENTS, a body corporate.

Charles J. Cook
Notary Public

My Commission Expires:

October 5, 1985

Exhibit B

Unofficial Document

When recorded return to:
 Jennus L. Burton
 ARIZONA STATE UNIVERSITY
 Administration Building
 Business Affairs Div.
 Tempe, Arizona 85287
 181,080 CLC

ASSIGNMENT OF LEASES

ZSG LSH

2 of 3
 THIS ASSIGNMENT entered into this 21st day of November, 1983, between TEMPE SHOPPING CENTER, INC., an Arizona corporation, hereinafter referred to as Assignor, and THE ARIZONA BOARD OF REGENTS, for and on behalf of Arizona State University, hereinafter referred to as Assignee.

For and in consideration of Ten Dollars and other good and valuable considerations, Assignor hereby assigns to Assignee all of the right, title and interest of Assignor in, under or by virtue of the leases described herein, affecting the real property hereinafter described, together with any renewals or extensions thereof, and together with all rents, income and profits arising therefrom. This assignment shall include any and all leases or rental agreements that may now be in effect between the Assignor and tenants of the real property described below.

Assignor covenants and warrants to Assignee that the terms of the leases heretofore submitted to Assignee embody the entire agreement now existing between the Assignor and tenants under said leases; and that, with the exception of the assignment of leases to Connecticut Mutual Life Insurance Company dated August 30, 1978, Assignor has not executed any prior assignment of said leases or rentals nor has the Assignor performed any acts or executed any other instrument which might prevent Assignee from operating under any of the terms and conditions of this assignment.

Assignor specifically assigns to Assignee all of Assignor's right, title and interest in collecting from the tenants under said leases their respective prorata shares of the 1983 real property taxes.

The leases described on Exhibit "A" attached hereto and incorporated herein affect the real property described as follows:

THAT PART of the North half of the Northwest quarter of Section Twenty-two (22), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being known as Block Twenty-two (22) and Twenty-seven (27), of GAGE ADDITION, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 58, being described as all premises lying South of the South line of 8th Street and North of the North line of 10th Street lying West of the West line of Myrtle Avenue and East of the East line of Mill Avenue, City of Tempe, Arizona.

All covenants and agreements herein contained shall extend to and inure to the benefit of and be binding upon the respective heirs, executors,

Recorded in official records of Maricopa County, Arizona

DATE NOV 21 1983 - 12 18

BILL HENRY, COUNTY RECORDER /4

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administrators, successors, and assigns of the parties hereto. This agreement shall be governed by the laws of the State of Arizona and may not be modified except upon the mutual written consent of both parties.

Assignor specifically assigns to Assignee all of Assignor's right, title and interest in collecting from the tenants their respective prorata share of insurance premium paid by Assignor from September 26, 1983, through November 20, 1983.

IN WITNESS WHEREOF, the Assignor, a corporation, has caused this assignment to be executed by its duly authorized officer on the day and year first written above.

TEMPE SHOPPING CENTER, INC.

By: Charles M. Sechrist
Charles M. Sechrist, President

STATE OF ARIZONA)
) ss.
County of Maricopa)

The foregoing instrument was acknowledged before me this 21st day of November, 1983 by CHARLES M. SECHRIST, the President of TEMPE SHOPPING CENTER, INC., an Arizona corporation, on behalf of the corporation.

Charles M. Sechrist
Notary Public

My Commission Expires:

October 5, 1985

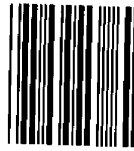
83 468422

EXHIBIT A
SCHEDULE OF LEASES

TENANT	SQ. FT. AREA	CURRENT LEASE EXPIRATION
Revco	7,400	08/31/93
Athletic Shoe Factory	3,600	10/30/89
Pioneer Camera	1,250	12/31/92
A.S.U. Barber	750	11/30/96
Jans Restaurant	1,000	02/28/88
Headlines	1,000	08/31/87
Appetitos	2,300	12/31/84
Good Earth	7,800	4/14/2003
Lee Optical	1,800	05/31/91
Artistic Trophy	1,200	05/31/87
31 Flavors	960	05/31/87
Siesta Laundry	2,200	11/30/86
Tower Records (additional 2400 as of 1/1/84)	4,400	03/30/86
Flints Dis- tributing Co. (to 4200 as of 1/1/84)	2,400	12/31/98
First Interstate Bank	Land Only	07/31/90
Pic N' Save	20,000+ Mezz.	02/28/87
Brickies	4,200	no./no.
Books Etc.	3,750	8/31/88
U Shop	1,575	02/29/84
Honey Yogurt	1,875	12/31/88
Tops Liquor	2,700	08/31/92
Bilco Sales	1,875	03/31/84
Sportswear Racket	1,875	01/31/85
Radio Shack	1,875	07/31/85
Mac Jewelry	750	08/31/85
Browns Card & Party Center	2,250	06/30/90
Low Cost	19,800	02/01/86
Eskills Clog Shop	1,326	04/30/88 MONTH TO MONTH <i>CMS</i>
Winchells	1,200	06/30/98
Godfathers Pizza	3,248	06/30/88
Scholotzky's Sandwich	1,300	11/30/83

Exhibit C

Unofficial
Document



When recorded, mail to:
Arizona State University
Attn: Karen Kloc
Box 876906
Tempe, AZ 85287-6906

OFFICE
MARICOPA COUNTY RECORDER
HELEN PURCELL
93-0451305 07/12/93 10:24

LAURENCE 5 OF 25

LAURENCE TITLE OF ARIZONA, INC.

M

Warranty Deed
CORPORATION

For the consideration of Ten Dollars, and other valuable considerations,
TEMPE SHOPPING CENTER, INC., an Arizona corporation,
does hereby convey to THE ARIZONA BOARD OF REGENTS, for and on behalf of
ARIZONA STATE UNIVERSITY,
the following real property situated in Maricopa County, Arizona:

See Exhibit "A" attached hereto and incorporated
herein by this reference.

This deed is exempt from A.R.S. 42-1612 pursuant
to A.R.S. 42-1614(A) (3).

SUBJECT TO: Current taxes and other assessments, reservations in patents and all easements, rights of way, encumbrances,
liens, covenants, conditions, restrictions, obligations and liabilities as may appear of record.

The undersigned hereby warrants the title against all persons whomsoever, subject to the matters set forth.

Together with all rights and privileges appurtenant or to become appurtenant to said lands, including but not limited
to, the subscription for shares of the capital stock of the Salt River Valley Water Users' Association, or by virtue of any
Water Right Application for Water Rights for all or any portion of said lands in the Salt River Project of the United States
Reclamation Service, and subject to all the terms, conditions and liabilities incident thereto, and subject to any liabilities or
obligations imposed upon said lands by reason of the inclusion thereof within the boundaries of the Salt River Project Agri-
cultural Improvement and Power District.

IN WITNESS WHEREOF, said Corporation has caused these presents to be signed by its duly authorized officer(s),

and its corporate seal to be hereunto affixed this 21st day of November, 19 83.

XXXXXX

TEMPE SHOPPING CENTER, INC.,
an Arizona corporation

By Charles M. Sechrst
Charles M. Sechrst

STATE OF ARIZONA
County of Maricopa } ss.

Its President

On this 21st day of November, A.D., 19 83, before me, the undersigned officer, personally
appeared Charles M. Sechrst xxx

who acknowledged (himself) (~~the corporation~~) to be the President xxx
TEMPE SHOPPING CENTER, INC.,
an Arizona corporation, xxx and that (he) (~~they~~) as such officer(s), being
authorized so to do, executed the foregoing instrument for the purposes therein contained, by signing the name of the Cor-
poration by (himself) (~~the corporation~~) as such officer(s).

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

My commission expires: October 5, 1995

Charles S. Cook
Notary Public

Lawyers Title
OF ARIZONA

EXHIBIT "A"

THAT PART of the North half of the Northwest quarter of Section Twenty-Two (22), Township One (1) North, Range Four (4) East of the Gila and Salt River Base and Meridian, Maricopa County, Arizona, being known as Block Twenty-two (22) and Twenty-seven (27), of GAGE ADDITION, according to the plat of record in the office of the County Recorder of Maricopa County, Arizona, in Book 3 of Maps, page 58, being described as all premises lying South of the South line of 8th Street and North of the North line of 10th Street lying West of the West line of Myrtle Avenue and East of the East line of Mill Avenue, City of Tempe, Arizona.

Exhibit D

C2018_06-47-2-1--
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WHEN RECORDED, RETURN TO:

City of Tempe basket

**CONVENTION AND CONFERENCE CENTER
DEVELOPMENT AGREEMENT**

C2018-06

THIS CONVENTION AND CONFERENCE CENTER DEVELOPMENT AGREEMENT (the "**Agreement**") is executed as of this 11 day of January, 2018 (the "**Effective Date**") by the CITY OF TEMPE, a municipal corporation ("**City**"), and Omni Tempe, LLC, a Delaware limited liability company ("**Omni**").

RECITALS

A. The Arizona Board of Regents ("**ABOR**"), a body corporate, for and on behalf of Arizona State University ("**ASU**") is the Owner of certain real property (the "**Property**") consisting of approximately 2.25 acres located at the southeast corner of University Drive and Mill Avenue in the City of Tempe. ASU and City desire that all or a substantial portion of the Property to be redeveloped to include, among other things a hotel, convention and conference center and other commercial enterprises and other improvements (the "**Project**").

B. ASU and City have, after consultation with numerous hotel developers and operators, selected Omni and Omni Hotels Management Corporation, a Delaware corporation, to develop a hotel and convention and conference center on the Property (individually, the "**Hotel Improvements**", the "**Conference Center Improvements**", and collectively, the "**Improvements**").

C. Simultaneous to and contingent upon the execution of this Agreement, ASU and Omni will enter into an Option to Lease and Escrow Instructions, dated as of the date hereof ("**Option to Lease**"), whereby ASU will grant Omni, an option to lease that portion of the Property described on Exhibit A attached hereto (the "**Project Parcel**"). Pursuant to the Option to Lease, if Omni exercises its option, ASU, as landlord, and Omni, as tenant will enter into a Ground Lease (the "**Hotel Lease**"), whereby ASU leases the Project Parcel to Omni, and Omni agrees to construct the Improvements in accordance with Hotel Lease.

D. City considers a convention and conference center to be of such significance to City that City has conducted studies regarding the viability and probable cost of building a conference center utilizing public funds or public debts, as has been done in neighboring communities, such as Phoenix, Glendale, and Scottsdale. After such review and study, City has concluded that a public-private partnership between City, ASU and Omni through the

development, redevelopment, operation and expansion of the Project is the most prudent solution to develop the Project and would be in the best interest of the City and its taxpayers.

E. The parties understand and acknowledge that this Agreement is a "Development Agreement" within the meaning of, and entered into pursuant to the terms of, Arizona Revised Statutes ("A.R.S.") § 9-500.05 to facilitate the redevelopment of the Property by providing for, among other things: (i) permitted uses of portions of the Property; and (ii) other matters related to the development, redevelopment, operation, and expansion of portions of the Property. The parties further agree that the terms of this Agreement shall constitute covenants running with the leasehold interest in the Property as more fully described in this Agreement.

F. The parties also understand and acknowledge that this Agreement is authorized and entered into in accordance with the provisions of A.R.S. § 9-500.11. The actions taken by City pursuant to this Agreement relating to retail development tax incentives are for economic development purposes as that term is used in A.R.S. § 9-500.11, are expected to assist in the creation and retention of jobs, and are expected to, in other ways, improve and enhance the economic welfare of the residents of Tempe. Pursuant to A.R.S. §9-500.11, City has previously adopted a notice of intent to enter into this Agreement and its Council has made the findings required by A.R.S. §9-500.11, such findings having been verified by an independent third party before City entered into this Agreement. Such findings are, by this reference, incorporated into this Agreement as though set forth in their entirety herein.

G. In addition to the creation and retention of jobs within Tempe, construction of the Improvements will foster increased tourism within Tempe, all of which will redound to the economic benefit of the residents of Tempe. To evidence its support for these tourism-related operations, City has agreed pursuant to Section 9-500.06 of the Arizona Revised Statutes, as amended, to allocate and pay the "City Payments" (as hereafter defined) from a portion of the Project Tax Revenue (as hereafter defined) collected by City as a result of the operation of the Project.

H. The parties wish to set forth certain terms and conditions relating to the use, operation, repair, replacement and maintenance of the Project.

NOW THEREFORE, for good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Construction of the Project. Following execution of the Hotel Lease, Omni agrees to construct the Improvements in accordance with, and as described in, Exhibit B hereto (the "Construction Covenant").

2. Operation of Conference Center Improvements.

2.1 Operating Standard. Assuming execution of the Hotel Lease, Omni or any successor approved pursuant to Section 2.2 below (the "Hotel Operator") shall operate the Conference Center Improvements as a convention and conference center and ancillary uses as set forth in Exhibit B or such other standard as agreed between Hotel Operator and City (the

“Operating Standard”) for a minimum of sixty (60) years after the Completion Date (the **“Restriction Period”**).

2.2 Hotel Operator. If Omni wishes to designate a replacement Hotel Operator following completion of the Improvements and prior to the expiration of the Restriction Period, such replacement Hotel Operator shall be subject to City’s prior approval, which approval will not be withheld, conditioned or delayed unreasonably; provided, however, that Omni may designate a replacement Hotel Operator without the City’s prior approval if such replacement Hotel Operator is operating under the brand standards of any of Marriot, Westin, Hyatt, InterContinental or Fairmount. Without limiting the foregoing, in assessing whether to approve a potential replacement, City shall have the right to consider, without limitation, whether the proposed operator is adequately capitalized, the branding of the Hotel Improvements and specifically the adequacy of the flag under which the Improvements will be operated, and whether the replacement operator has at least ten (10) years’ experience operating similar facilities. Any successor Hotel Operator shall be subject to and bound by the terms of this Agreement, and shall execute such documents as City may request to evidence and confirm the same.

2.3 Operating Costs. Hotel Operator shall pay all costs and expenses associated with the use, operation, maintenance, repair and replacement of the Improvements until the expiration or prior termination of the term of the Hotel Lease.

3. Economic Incentives. City has determined that the construction of the Improvements and operation of the Project within City’s corporate limits, accompanied by the satisfaction of the Construction Covenant by Omni and the Operating Standard by the Hotel Operator, among other things, (i) is expected to enhance the economic health of Tempe; (ii) is expected to result in a net increase of jobs in Tempe; (iii) is expected to increase Tempe’s construction and transaction privilege taxes; (iv) is expected to otherwise improve or enhance the economic welfare of Tempe residents; and (v) demonstrates the potential to generate tax revenues and other benefits (both tangible and intangible) to City that outweigh or are not disproportionate to the costs associated with these incentives. Omni has confirmed to City that without the incentives provided by City in this Agreement, the incentive provided by ASU in the Option to Lease and the general support by City and ASU of the Project, Omni would not be able to develop the Project in the same time, place or manner, and would not undertake this development.

Accordingly, in consideration for compliance with the Construction Covenant, the Use Restriction, the Operating Standard, and for the other direct public benefits described in Section 5 below and elsewhere in this Agreement, City has agreed to provide the following economic incentives (the **“Economic Incentives”**) to Omni, expressly conditioned upon compliance with and satisfaction of the Construction Covenant by Omni and of the Operating Standard by the Hotel Operator, and the absence of any default by Omni or the Hotel Operator of any term, condition or provision of this Agreement beyond the expiration of any notice and cure period, including any cure period granted to any Mortgagee (as hereafter defined) under Section 7.1.3 hereof.

3.1 During each of the first ten (10) years of the Payment Period (defined in Section 3.3), City shall pay to Omni (i) fifty percent (50%) of the Unrestricted Portion of the transaction privilege tax on construction contracting, hotels, and restaurants pursuant to Sections 16-415, 16-444, 16-445 and 16-455 of the Tempe City Code (collectively, the “**Transaction Privilege Tax**”) of such taxes paid by Omni and only as actually collected by City with respect to the Project, and fifty percent (50%) of the additional tax on transient lodging levied by City pursuant to Section 16-447 of the Tempe City Code (the “**Transient Lodging Tax**”) of such taxes paid by Omni in excess of \$1,238,000 (which amount shall be adjusted annually starting after the fourth year of the Payment Period by the greater of three percent 3% or in accordance with the Consumer Price Index for All Urban Consumers, All Items, for the market area that includes the Project, as published by the Bureau of Labor Statistics of the United States Department of Labor, using the years 1982-84 as a base of one hundred 100, or if such index is discontinued, the most comparable index published by any federal governmental agency, (the “**Threshold Amount**”) and (ii) one hundred percent (100%) of the Unrestricted Portion of the combined Transaction Privilege Tax and Transient Lodging Tax paid by Omni below the Threshold Amount, in each case, only as actually collected by City with respect to the Project for such expenses that are incurred by the Developer on or after the Effective Date subject to reimbursement pursuant to this Section 3. Reimbursements from construction sales tax do not apply to the Threshold Amount.

During each year of the balance of the Payment Period, City shall pay to Omni (i) fifty percent (50%) of the Unrestricted Portion of the combined Transaction Privilege Tax and Transient Lodging Tax paid by Omni in excess of the Threshold Amount and (ii) ninety percent (90%) of the Unrestricted Portion of the combined Transaction Privilege Tax and Transient Lodging Tax paid by Omni below the Threshold Amount, in each case, only as actually collected by City with respect to the Project.

The amounts paid by City to Omni pursuant to this Section 3.1 are referred to herein as the “**City Payments**.” As of the date hereof, the Unrestricted Portion of the transaction privilege tax is one point two percent (1.2%) and the additional tax on transient lodging is five percent (5%). For purposes hereof, “**Unrestricted Portion**” means the transaction privilege taxes on construction contracting, hotels, and restaurants levied by City pursuant to Sections 16-415, 16-444, 16-445 and 16-455 of the Tempe City Code, and the additional tax on transient lodging levied by City pursuant to Section 16-447 of the Tempe City Code, adopted or approved by the City Council of City of Tempe and, to the extent required by the Tempe City Charter, approved by the electorate, in either case without restriction as to effectiveness, use or application. Examples of the restricted portion of such taxes include those levied pursuant to City of Tempe Ordinance numbers 96.41, 2000.73 and 2010.20.

3.2 In no event shall the City Payments exceed the Maximum City Contribution (as defined below). For purposes hereof, “**Maximum City Contribution**” means a cumulative amount equal to a net present value of Twenty-One Million Dollars (\$21,000,000) as of the Completion Date. The Maximum City Contribution shall be calculated by aggregating the City Payments made to the date of calculation and determining the net present value of such payments as of the Completion Date, using a discount rate of eight percent (8%) per annum.

Calculations shall commence on the fifth (5th) anniversary of the Completion Date and continue at such intervals thereafter as City deems appropriate until such time as the City Payments have reached the Maximum City Contribution. City shall provide Developer with a courtesy copy of its calculations; however, City's calculations shall be binding in the absence of manifest error.

3.3 City shall begin the City Payments no sooner than the ninetieth (90th) day after the Completion Date (as hereafter defined) (the "**Commencement Date**"). The City Payments shall continue within ninety (90) days after the end of each calendar quarter thereafter during which funds from the Unrestricted Portion are or become available until the earlier of (y) such time as the Maximum City Contribution has been paid in full or (z) the ninetieth (90th) day following the thirtieth (30th) anniversary of the Commencement Date (such time period being referred to herein as the "**Payment Period**"). No interest shall accrue on the unpaid balance of the Maximum City Contribution. In this respect, Omni acknowledges that the City Payments will be spread over a number of years, and the date on which the Maximum City Contribution will have been paid and the length of the Payment Period will depend entirely on the success of the operations of the Project, generation of funds constituting part of the Unrestricted Portion, and actual receipt of such funds by City. In no event shall City be required to pay to Omni the unpaid balance of the Maximum City Contribution if the amount of the Unrestricted Portion generated over the Payment Period is less than the Maximum City Contribution.

3.4 Nothing in this Section 3 shall be construed to require City to make any payment to Developer until the Unrestricted Portion is actually generated and received by City. Further, in no event shall the City Payments exceed the Maximum City Contribution; if City subsequently determines that there has been an overpayment, Omni shall reimburse same to City within thirty (30) days after written request. City Payments may be delayed if the responsible taxable party fails to file the applicable tax returns and make the applicable tax payments for the period to which the City Payment relates. If such a failure occurs, City shall make the required payment of the City Payment within ninety (90) days after the applicable taxable party files the applicable tax return and/or makes the applicable tax payment. If the Project tax revenues are reported on tax returns filed by different entities, City will make the City Payments from each applicable return, as described above.

3.5 Unless otherwise directed by Omni and any successor Hotel Operator approved by City, the City Payments under this Section 3 shall be paid to the party that is the Hotel Operator at the time such City Payment is made.

4. Term. This Agreement shall commence on the Effective Date and shall continue until the later of (i) the sixtieth (60th) anniversary of the Effective Date, or (ii) the expiration or earlier termination of the Hotel Lease (the "**Expiration Date**"). Notwithstanding anything contained herein to the contrary, this Agreement shall terminate if (a) Omni's option to lease the Project Parcel terminates either because (I) Omni does not exercise it by the applicable deadline under the Option to Lease, (II) the Option to Lease is terminated pursuant to its terms or (III) following its exercise, Omni fails to close on its lease of the Project Parcel by the applicable deadline under the Option to Lease, or (b) the Hotel Lease is terminated for any reason prior to the Completion Date, (c) if there is an uncured material default by Omni as provided in Section

7.2 unless the default has been cured by Omni within any applicable notice and cure period or by a Mortgagee (as defined in and pursuant to Section 7.1.3).

5. Direct Public Benefits. City and Omni hereby acknowledge that the Construction Covenant, the Operating Standard and the covenants contained in this Section 5 constitute direct public benefits and constitute consideration for, and would not have otherwise been agreed to or provided but for, the Economic Incentives agreed to by City hereunder, the incentives provided by ASU under the Option to Lease and the general support of City and ASU of the Project.

5.1 Minimum Amenities Level. Following execution of the Hotel Lease, Omni agrees to construct the Improvements in accordance with, and as described below and in, Exhibit B, at its sole cost and expense. The Hotel Improvements and Conference Center Improvements shall include, without limitation:

- (a) a hotel containing at least 330 rooms;
- (b) a conference center facility with at least 30,000 square feet, including a main ballroom containing at least 15,000 square feet, with the capacity to seat a minimum of 1,000 persons in banquet (ten-top round table) configuration, and adjacent pre-function space;
- (c) separate facilities for recycling and trash collection, as well as a separate compactor for recycling and trash, with the Hotel Operator agreeing in this regard to participate in local recycling programs during the term of this Agreement; and
- (d) such other amenities determined by Omni in consultation with ASU and City.

Omni shall consult with the Tempe Tourism Office and City to determine size and configuration of the facilities in the Conference Center Improvements. City shall have the right to approve plans and specifications for the Hotel Improvements and Conference Center Improvements, which approval shall not be unreasonably withheld. If Omni has submitted plans and specifications for the Hotel Improvement and Conference Center Improvements to City and has not received a response from City within thirty (30) days following submittal of such plans and specifications, such plans and specifications shall be deemed approved by City. The approval shall be in addition to any regulatory action that would be customarily exercised by City.

5.2 Preference to Local Businesses; First Consideration to Small, Minority-Owned and Women-Owned Business Enterprises. In order to effectuate the creation of expanded employment opportunities in Tempe, especially for small, minority-owned and women-owned business enterprises, Hotel Operator agrees to use commercially reasonable efforts to utilize local and regional business enterprises (meaning businesses with a significant business presence where employees are regularly based and that such place of business has a substantial role in the business' performance of a commercially useful function in the Tempe area) and to afford them the opportunity to participate in trade agreements and/or subcontracts it

awards, to the full extent consistent with the efficient performance of the work, provided that such local and regional business enterprises offer competitive pricing, quality, work and service. Additionally, Hotel Operator agrees to provide first consideration to local small, minority-owned, and women-owned business enterprises with respect to their doing business with the Project. Hotel Operator further agrees to participate in local workforce development career and job fairs at least one (1) time per year for no less than three (3) years, including those that promote trade and job skill career training programs, for the benefit of Tempe youth, including high school and junior high school aged persons.

5.3 Local Supply and Service Expenditures. In order to support the local economy of Tempe, beginning with the calendar year in which completion of the Project occurs, and each subsequent year of the Restriction Period, Hotel Operator agrees that at least Twenty-Five Thousand Dollars (\$25,000) in supply and service expenditures (the “**Minimum Supply and Service Expenditures**”) shall be made with local Tempe companies or the Tempe branch of any company with multiple locations; provided, however, that if the completion of the Project occurs on a date other than January 1, then only for the calendar year in which the completion occurs, this commitment shall be reduced to an amount equal to the product of Twenty-Five Thousand Dollars (\$25,000) and a fraction, the numerator of which is the number of days remaining in the year after the completion of the Project and the denominator of which is three hundred sixty-five (365). If Hotel Operator fails to satisfy the Minimum Supply and Service Expenditures in any year during the Restriction Period, City shall be permitted to reduce the City Payments in the subsequent year by the amount of the shortfall between the actual supply and service expenditures and the Minimum Supply and Service Expenditures. Hotel Operator shall certify, on an annual basis, that the Minimum Supply and Service Expenditures have been spent with Tempe companies. Upon request by City, Hotel Operator shall provide City with the documentation necessary to confirm the Minimum Supply and Service Expenditures.

5.4 Naming Rights. During the Restriction Period, (i) the name of the Improvements shall be a variant of Omni Tempe Hotel and Conference Center at ASU or other similar moniker which includes the words “Tempe” and “ASU”, (ii) the name of the Conference Center Improvements shall not be changed without the prior written consent of City, which consent may be granted or withheld in its unfettered discretion, provided that if Omni ceases to be the Hotel Operator, the name may be changed to reflect such change in the identity of the Hotel Operator but not the reference to “Tempe” or “ASU.” In no event shall the name of the Project include the name of any other municipality or geographic area or any colloquial expression used to describe the Phoenix Metropolitan Area. During the Restriction Period, whenever referring to the Project in marketing materials including, but not limited to, all forms of media advertising (including television, radio, print, billboard, brochure and internet), direct mail, direct marketing, and sponsorship marketing (“**Marketing Materials**”), Omni shall use, and shall require the Hotel Operator to use, the name of the Conference Center Improvements in full; provided that building signage may refer only to the “Omni (or the name of the Hotel Operator) Hotel.” Omni and City agree that the value of such naming rights is Five Hundred Thousand Dollars (\$500,000) based upon local, customary, market-rate estimates.

5.5 Tourism Promotion Expenditures. So long as the Hotel Lease is in effect, the Hotel Operator covenants and agrees to expend a minimum of Four Hundred Thousand Dollars (\$400,000) annually during the term of this Agreement on the promotion of tourism in Tempe, which activities may, at the discretion of the Hotel Operator, include, but are not limited to, any and all forms of Marketing Materials and related promotional activities, marketing through trade associations, including, without limitation, targeted marketing trips to association meetings, conventions and related events; complimentary trips to familiarize convention or trade show organizers with Tempe, unique local experiences, and the Project; other travel to promote Tempe and the Project; and other advertising and promotional activities developed as part of an overall advertising and marketing strategy to promote Tempe and the Project (“**Tourism Promotion Expenditures**”). Such Tourism Promotion Expenditures shall include City of Tempe name, a description of major local events or amenities, as reasonably determined and identified in a timely fashion by City, and the promotion of Tempe and the Project as a unique place to visit, shop and conduct business meetings and conferences. On or before April 1 of each year, the Hotel Operator shall provide City and the Tempe Tourism Office with a summary of all material proposed Tourism Promotion Expenditures for the following calendar year. City and the Tempe Tourism Office shall have the right to review and comment on the proposed for use as Tourism Promotion Expenditures for the following year. On or before April 1 of each year, the Hotel Operator shall provide City and the Tempe Tourism Office with a summary of all of the Tourism Promotion Expenditures for the preceding year.

5.6 Use Restriction. Omni agrees to devote a portion of the Project Property to use as a hotel, convention and conference center and ancillary purposes during the Restriction Period, which will be evidenced by the recordation in the Official Records of Maricopa County (contemporaneously with the execution of the Hotel Lease), by ASU of a restrictive covenant (the “**Use Restriction**”) for the benefit of City. The Use Restriction shall be in the form attached hereto as Exhibit C, shall remain in effect throughout the Restriction Period and shall not be amended without City’s prior written consent; provided that the Use Restriction may be amended to reflect any minor boundary adjustments between the Project Parcel and adjoining property owned by ASU. Notwithstanding anything contained herein to the contrary, the Use Restriction shall terminate if the Hotel Lease is terminated for any reason prior to the date the Improvements are completed (i.e., prior to issuance of a temporary or final certificate of occupancy allowing all or substantially all of the Improvements to be used by the public) (the “**Completion Date**”).

5.7 Use of Hotel Improvements and Conference Center Improvements. City shall have use of the Conference Center Improvements for a combined seven (7) days each year at no cost on a space available basis to be booked in accordance with procedures to be agreed to. During such periods of use, event set up and tear down and equipment to be furnished at no cost to City and will include tables, chair, pipe and drape, audio visual equipment (owned by Hotel operator) and any other equipment typically provided to Conference Center Improvements patrons. The cost of food and beverage services, or other services, will be paid for by City.

5.8 Support of Local Artists. In order to foster and support the local art community, Omni agrees to include in the Project artwork from local Tempe artists to the extent

practicable and in conformity with the design guidelines of Project and pursuant to City's Art in Private Development requirements.

5.9 Creation of Jobs. Hotel Operator agrees that (i) sixty percent (60%) of the managerial jobs created by the use of Hotel Improvements and Conference Center Improvements shall pay wages equal or in excess of the City's average median income, which is Forty-Nine Thousand Twelve Dollars (\$49,012) as of the Effective Date and (ii) that all hourly jobs created by the use of Hotel Improvements and Conference Center Improvements shall pay wages equal or in excess of the average wages for such position as provided by Wage Watch for the hotel industry in the Tempe/Phoenix area. Hotel Operator further agrees that it shall create no less than Three Hundred (300) jobs in the construction and/or hospitality industries within three (3) years of the date of execution of this Agreement. Hotel Operator shall provide City with an annual report beginning on the first anniversary of the date of this Agreement setting forth all jobs created pursuant to this Section 5.9 with a running total of all jobs created pursuant to this section since the date of this Agreement.

5.10 Contribution to Streetcar. Hotel Operator agrees to make contributions to offset the city contribution to the Tempe streetcar project as stated in Exhibit D to this Agreement. Such Exhibit D shall be incorporated herein by this reference as though fully set forth herein.

6. Records. Within thirty (30) days following a request from City, but no more often than twice in any calendar year, the Hotel Operator will make available to City all books and records related to the Minimum Supply and Service Expenditures and the Tourism Promotion Expenditures. Such books and records will be made available at the Project or at another location agreed to by City and the Hotel Operator.

7. Default and Remedies.

7.1 Events Constituting Default.

7.1.1 A party hereunder shall be deemed to be in default under this Agreement if such party breaches any obligation required to be performed by the respective party hereunder, and such breach or default continues for a period of twenty (20) days after written notice of the default, in the event of a monetary default, or one hundred twenty (120) days after written notice of the default, in the event of non-monetary default, from the non-defaulting party (or, if a non-monetary default cannot reasonably be cured within one hundred twenty (120) days, then the party shall be in default if it fails to commence the cure of such breach within the one hundred twenty (120)-day period and diligently pursue the same to completion); provided, however, that said one hundred twenty (120)-day period shall be extended for reasons of a Force Majeure Event as set forth below.

7.1.2 Subject to the rights of a Mortgagee to avoid a termination, as defined and set forth in Section 7.1.3, the Hotel Operator also shall be deemed to be in default under this Agreement if (a) any petition or application for a custodian, as defined by Title 11, United States Code, as amended from time to time (the "**Bankruptcy Code**") or for any form of

relief under any provision of the Bankruptcy Code or any other law pertaining to reorganization, insolvency or readjustment of debts is filed by or against the Hotel Operator or any entity that owns or controls the Hotel Operator, and such petition or application is not dismissed within one hundred twenty (120) days of such filing; (b) the Hotel Operator makes an assignment for the benefit of creditors, is not paying material debts as they become due unless such debts are disputed, or is granted an order for relief under any chapter of the Bankruptcy Code; (c) a custodian, as defined by the Bankruptcy Code, takes charge of any property of the Hotel Operator that would render the Hotel Operator unable to perform its obligations hereunder; (d) garnishment, attachment, levy or execution in an amount that would render the Hotel Operator insolvent or incapable of performing the Construction Covenants and meeting the Operating Standard (but in no event less than ten percent (10%) of its net worth) is issued against any of the property or effects of the Hotel Operator, and such issuance is not discharged or bonded against within one hundred twenty (120) days; or (e) the dissolution or termination of existence of the Hotel Operator unless its successor by transfer or operation of law is continuing the business of operating the Project.

7.1.3 City, upon providing the Hotel Operator any notice of a default under this Agreement shall at the same time provide a true copy of such notice to the holder of a leasehold mortgage, deed of trust, or security instrument encumbering the Hotel Operator's leasehold interest in the Project Parcel (a "**Mortgagee**") which has delivered to City, in the manner provided herein for the giving of notice under this Agreement, a request for notification and the address of the Mortgagee to which notices shall be sent. As between City and any Mortgagee which has complied with the foregoing delivery requirement, no such notice by City to the Hotel Operator shall be deemed to have been duly given unless and until a copy thereof has been provided to the Mortgagee. From and after such notice has been given to a Mortgagee, such Mortgagee shall have sixty (60) days, after the giving of such notice upon it, for remedying any default which is the subject matter of such notice or causing the same to be remedied. If the Hotel Operator or the Mortgagee fails to remedy the default that is the subject matter of such notice within such cure period, City may exercise the remedies set forth in this Agreement; provided, however, that the exercise of such remedies shall be extended by any additional time period granted to the Mortgagee under the Hotel Lease to cure the default and take possession of the Improvements as necessary to effect a cure, and during any such time period City shall continue making the City Payments, respectively, to the Mortgagee so long as the Hotel Operator or Mortgagee is diligently exercising its rights to cure.

7.2 Damages. Notwithstanding any provision of this Agreement to the contrary, in the event that a party is in default under this Agreement and fails to cure such default within the applicable period of cure set forth in Section 7.1 above, the parties hereby agree in any action hereunder to seek recovery only of actual damages incurred, and each party waives any right to recover punitive and/or consequential damages as a result of any event of default hereunder by the other parties under this Agreement. For the avoidance of doubt, the sole remedy for breaches of this Agreement shall be the monetary damages set forth in this Section 7.2 and neither party hereto shall have the right to terminate this Agreement for breach hereof.

8. Conflict of Interest; Representatives Not Individually Liable.

8.1 Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested.

8.2 No Personal Liability.

8.2.1 No member, official or employee of City shall be personally liable to Omni or the Hotel Operator, or any successor or assignee, (a) in the event of any default or breach by City, (b) for any amount which may become due to Omni or the Hotel Operator or its respective successor or assign, or (c) pursuant to any obligation of City under the terms of this Agreement.

8.2.2 No member, manager or employee of Omni or Hotel Operator shall be personally liable to City (a) in the event of any default or breach by Omni or Hotel Operator, (b) for any amount which may become due to City, or (c) pursuant to any obligation of Omni or Hotel Operator under the terms of this Agreement.

9. General Provisions.

9.1 Assignment. Notwithstanding anything to the contrary in Section 2.2, Omni may assign its interest under this Agreement to (i) any assignee of, or successor to, Omni's interest in the Hotel Lease and (ii) any affiliate of Omni, in each case, without consent from, but with notice to, City. Except as set forth in the preceding sentence, neither of the parties shall assign its rights and obligations under this Agreement without the prior written consent of the other parties, each in its sole discretion, and any assignment without such consent shall be void. A transaction involving the sale, issuance or transfer of any membership or management interest in Omni or of any voting capital stock of any corporate entity which directly or indirectly controls, is controlled by or under common control with Omni or otherwise, shall also be deemed to be an assignment for purposes of this Agreement.

9.2 Notices. Any notice, request, approval, consent or document required or permitted in this Agreement (collectively, "**Notices**", or individually a "**Notice**") shall be in writing and delivered either personally or by private messenger service (including overnight courier) or by mail addressed as provided below. Any Notice shall be deemed to be given or received on the date received or refused. Any notice to be given by any party hereto may be given by legal counsel for such party. Counsel for the parties may give simultaneous notice hereunder to the opposing party and its counsel. Any copy noted below as mandatory shall be sent simultaneously with the notice to the Party. Each address shall for all purposes be as set forth below unless otherwise changed by Notice to the other party as provided herein:

To City: City of Tempe
Attn: City Manager

31 East Fifth Street
Tempe, AZ 85281

With a mandatory copy to:

City of Tempe
Attn: City Attorney
21 East Sixth Street, Suite 201
Tempe, AZ 85281

To Hotel Operator: c/o Omni Hotels
Attn: Mike Smith
4001 Maple Avenue, Suite 600
Dallas, Texas 75219

With a mandatory copy to:

c/o Omni Hotels
Attn: Paul Jorge
4001 Maple Avenue, Suite 600
Dallas, Texas 75219

and:

Winstead PC
Attn: T. Andrew Dow
500 Winstead Building
2728 N. Harwood Street
Dallas, TX 75201

9.3 Construction. Time is of the essence with respect to each provision of this Agreement; provided, however, that either party hereto shall be entitled to a fifteen (15) day cure period (or such longer time period agreed to by the parties hereto) for failure to meet any deadline set forth in this Agreement. The language in all parts of this Agreement shall in all cases be construed as a whole and simply according to its plain meaning and not strictly for nor against any of the parties, and the construction of this Agreement and any of its various provisions shall be unaffected by any claims, whether or not justified, that it has been prepared, wholly or in substantial part, by or on behalf of any of the parties. The parties do not intend to become, and nothing contained in this Agreement shall be interpreted to deem that City, and/or Omni are, partners or joint venturers in any way or that Omni is an agent or representative of City for any purpose or in any manner whatsoever. A male or female person may be referred to in this Agreement by a neuter or masculine pronoun. The singular includes the plural, and the plural includes the singular. A provision of this Agreement which prohibits a party from performing an action shall be construed so as to prohibit the party from performing the action or

from permitting others to perform the action. Except to the extent, if any, to which this Agreement specifies otherwise, each party shall be deemed to be required to perform its obligations under this Agreement at its own expense, and each party shall be permitted to exercise its rights and privileges only at its own expense. "Including" means "including and not limited to." "Include" means "includes and is not limited to." "Any" means "any and all." Except to the extent context requires otherwise, "may" means "may but shall not be obligated to." "At any time" means "at any time and from time to time." An expense incurred on behalf of a party shall be deemed to have been incurred by the party. An obligation performed on a party's behalf and pursuant to its request or consent shall be deemed to have been performed by the party.

9.4 Force Majeure. If any party hereto shall be delayed or prevented from the exercise of any right or the performance of any obligation of such party under this Agreement by reason of (a) acts of God, (b) strikes, (c) work stoppages, (d) unavailability of or delay in receiving labor or materials, (e) defaults by contractors or subcontractors, (f) weather conditions, (g) governmental moratoria on building permits or other approvals required for compliance with such deadline, (h) casualty event, (i) delays caused by acts of war or terrorism, (j) acts or omissions of the other party as required or prohibited herein, (k) the failure by another party to perform its obligations under this Agreement within the time period required hereunder, (l) unforeseen environmental contamination or other unforeseen site conditions, (m) the presence of historic or archeological site, burial grounds or funerary objects or (n) other cause without fault and beyond the reasonable control of the party obligated (financial inability excepted) (collectively, the "**Force Majeure Events**"), the timely exercise of such right or performance of such act shall be excused for the period of the delay, and the period for the exercise of such right or performance of any such obligation shall be extended for a period equivalent to the period of such delay, provided that if any of such Force Majeure Events occurs, the affected party(ies) shall give written notice to the other party(ies) within sixty (60) days after the party has actual knowledge of the occurrence of the Force Majeure Event, such notice to describe the Force Majeure Event, and the affected party shall use commercially reasonable efforts to minimize the impact of the Force Majeure Event. Lack of financial capacity shall not be a Force Majeure Event.

9.5 No Third Party Rights. Except as otherwise provided herein, nothing in this Agreement shall be construed to permit anyone other than City, Hotel Operator and Omni and their respective successors and assigns to rely upon the covenants and agreements herein contained nor to give any such third party a cause of action (as a third party beneficiary or otherwise) on account of any nonperformance hereunder.

9.6 Cooperation. The parties hereto hereby acknowledge and agree that they shall cooperate in good faith with each other and use reasonable best efforts to pursue the economic development of the Property as contemplated by this Agreement.

9.7 Dispute Resolution. If there is a dispute hereunder which the parties cannot resolve between themselves, the parties may agree to attempt to settle the dispute by nonbinding mediation before commencement of litigation. If the parties agree to mediation, the matter in dispute shall be submitted to a mediator mutually selected by the parties to the

dispute. In the event that the parties cannot agree upon the selection of a mediator within ten (10) days, then within five (5) days thereafter, the parties to the dispute shall request the presiding judge of the Superior Court in and for the County of Maricopa, State of Arizona, to appoint an independent mediator. The mediator selected shall have at least five (5) years' experience in mediating or arbitrating disputes relating to commercial property development. The cost of any such mediation shall be divided equally between the parties to the dispute, or in such other fashion as the mediator may order. The results of the mediation shall be nonbinding on the parties, and any party shall be free to initiate litigation or arbitration as set forth herein upon the conclusion of mediation. Notwithstanding the foregoing, in the case of a good faith dispute and until the resolution thereof, City shall continue paying the Economic Incentives except as to any particular payment if such payment is the subject of the dispute, and Hotel Operator shall continue to provide the benefits stated in Section 5 of this Agreement.

9.8 Captions. The captions used herein are for convenience only and not a part of this Agreement and do not in any way limit or amplify the terms and provisions hereof.

9.9 Estoppel Certificates. Within fifteen (15) days after receipt of request therefor from a party, the other parties shall furnish to the requesting party an estoppel certificate ("**Estoppel Certificate**") stating that this Agreement has not been amended or, if amended, specifying the amendments and that the requesting party has, to the date of the issuance of such Estoppel Certificate, satisfied the requesting party's contractual obligations or, if the requesting party has not satisfied its contractual obligations, stating those obligations which the requesting party has not satisfied and such other matters as the requesting party may reasonably require. Upon issuance of an Estoppel Certificate, the issuing party shall be estopped to deny the truth of any statement made in such Estoppel Certificate.

9.10 Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the State of Arizona without giving effect to conflicts of law principles. This Agreement has been made and entered into in Maricopa County, Arizona.

9.11 Successors and Assigns. Except as set forth in Section 9.1, this Agreement shall run with the land and all of the covenants and conditions set forth herein shall inure to the benefit of and be binding upon the successors and assigns of the parties hereto.

9.12 Waiver. No waiver by any party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

9.13 Attorneys' Fees. In the event of any actual litigation between the parties in connection with this Agreement, the party prevailing in such action shall be entitled to recover from the other party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury and included within the judgment.

9.14 Severability. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against

public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law.

9.15 Exhibits. All exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

9.16 Entire Agreement. This Agreement constitutes the entire agreement between the parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written are hereby superseded and merged herein.

9.17 Counterparts. This Agreement may be executed in multiple counterparts, each of which shall constitute an original but all of which together shall constitute one and the same instrument. Signature and acknowledgement pages may be removed from one counterpart and inserted into another counterpart to form a single document.

9.18 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after its approval and execution by City.

9.19 Consents and Approvals. Except as may be otherwise set forth in this Agreement, the parties hereto shall at all times act reasonably with respect to any and all matters which require any party to review, consent or approve of any act or matter hereunder. City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect the development of the Project, and hereby authorizes and empowers the City Manager to consent to any and all requests of Omni, such consent not to be unreasonably withheld, delayed or conditioned, requiring the consent of City hereunder without further action of City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any further amendment or modification of this Agreement.

9.20 Reviews and Approvals; Project Coordinators. City acknowledges and agrees that development of the Project by Omni will, as a result of the size of the Project and other economic factors, occur over a period of time and will require City's ongoing participation in the review and approval of preliminary and final site plans, infrastructure plans, drainage plans, design plans, building plans, special use permits, grading permits, building permits and other plans, permit applications and inspections which are part of City's current building and development requirements (hereinafter collectively referred to as "**Approval Requests**"). City and Omni agree that, in connection with all such Approval Requests relating to the development of the Project or the construction of any Improvements thereon, they shall cooperate with each other in good faith to expedite the processing and approval of any such Approval Requests and otherwise accelerate the review and response to all such Approval Requests to the greatest extent possible.

Without limiting the foregoing, City shall designate a project coordinator who shall work together to meet Omni's project timelines in accordance with a customized plan review schedule

to be mutually agreed upon by City and Omni. Project coordinators may be changed upon written notice to the other party. Any project coordinator shall have the right to request a meeting of the project coordinators upon five (5) business days' written notice. In the event that any design, development or construction issues arise which cannot be timely resolved through ordinary City processes and procedures, the project coordinators and, if requested by Omni, City's review coordinators meet and work together in good faith to expeditiously address and resolve all pending issues. The parties hereby designate the following individuals as their initial project coordinators:

City: Alex Smith

Omni: Mike Smith

9.21 Omni's Representations. Omni represents and warrants to City as follows:

(a) Omni has the power and authority to execute, deliver and perform its obligations under this Agreement and has obtained all necessary consents, authorizations and approvals required as a condition to the execution and delivery thereof.

(b) The execution of this Agreement will not violate or constitute a default on the part of Omni under any agreement to which Omni is a party or by which it is bound.

(c) The representatives of Omni who have executed this Agreement have the power and the authority to have done so.

(d) Omni is a limited liability company duly organized and validly existing under the laws of the State of Arizona and is qualified to do business in Arizona.

(e) To Omni's knowledge, no conflict of interest exists, or if one exists, it has been fully and properly disclosed and waived by persons or entities duly empowered and authorized to grant such waiver, between or among any of the following entities or individuals: (i) Omni, (ii) any Omni Affiliate, (iii) any entity or individual who has a direct or indirect financial interest (including by way of example, but not of limitation, employment, consultancies, stock ownership, or other equity interest) or a direct or indirect non-financial interest (including by way of example, but not of limitation, personal or professional relationships or affiliations or committee memberships) in (1) Omni or any Omni Affiliate, (2) the rights granted to Omni pursuant to this Agreement or pursuant to any agreements arising out of this Agreement, or (3) any entity or individual who will be granted rights to use or occupy space in the Project Parcel (an "**Interested Party**") that would provide a basis to challenge any Interested Party's authority to enter into or perform its obligations under this Agreement or under any agreements arising out of this Agreement to which Omni or an Interested Party is a party (each a "**Project Related Agreement**") or the validity of this Agreement or any Project Related Agreement. Omni will require all Interested Parties to make this same representation and warranty in all Project Related Agreements, and ASU shall be a third party beneficiary of all such representations and warranties. For purposes of this Agreement, "Affiliate"

means any entity that directly or indirectly controls, is controlled by, or is under common control with, such entity. As used in this definition of “Affiliate”, the term “control” means either (i) the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies of an entity, whether through the ownership of voting securities, by contract, through the appointment of a majority of the members of a governing body, by being the sole member of a nonprofit entity or otherwise, or (ii) a direct or indirect equity interest of fifty percent (50%) or more in the entity.

9.22 City’s Representations. City represents and warrants to Omni as follows:

(a) It has the power and authority to execute, deliver and perform its obligations under this Agreement and has obtained all necessary consents, authorizations and approvals required as a condition to the execution and delivery thereof.

(b) The execution of this Agreement will not violate or constitute a default on the part of City under any agreement to which it is a party or by which it is bound.

(c) The representatives of City who have executed this Agreement have the power and the authority to have done so.

(d) City has not, to its knowledge, received service of process regarding, and City knows of no, litigation, proceeding or investigation, nor threat thereof, contesting the powers of City or its officials with respect to the Project or this Agreement, as applicable, or that could materially impact City’s ability to enter into this Agreement or consummate the transactions contemplated by this Agreement.

9.23 Approvals. Except as otherwise set forth herein, if a party’s consent, approval, agreement or waiver is required or requested hereunder (an “**Approving Party**”), the Approving Party shall not unreasonably withhold, delay or condition such consent, approval, agreement or waiver. If the Approving Party fails to respond in writing to any request for consent, approval, agreement or waiver (by granting or withholding consent, approval, agreement or waiver or requesting a meeting or further information) within fifteen (15) days following delivery of such notice, then the requesting party may give a second notice to the Approving Party requesting consent, approval, agreement or waiver on which the following language must appear in bold print: **“FAILURE TO RESPOND TO THIS NOTICE WITHIN FIVE BUSINESS DAYS FROM ITS RECEIPT SHALL RESULT IN THE ACTION OR MATTER DESCRIBED HEREIN BEING DEEMED APPROVED.”** If the Approving Party fails to respond in writing (in the manner described above) to any matter in such second notice within five (5) business days following delivery of such notice, that matter shall be deemed to have been approved by the Approving Party.

9.24 Requests for Action. To facilitate Omni’s ability to expeditiously pursue the development of the Project as contemplated hereunder, City shall designate at least two (2) individuals, each acting alone and without the necessity of the approval of the other, to serve as a liaison for and with the authority to act on behalf of City, including the power and authority to grant any consents, approvals, agreements or waivers. Until City revokes such designation by

written notice to Omni given pursuant hereto and designates another individual in lieu thereof, City hereby designates the City Manager and the City Attorney to act on its behalf as contemplated herein. Notwithstanding the foregoing, Omni shall still be required to submit all notices required hereunder to the parties designated in Section 9.2.

9.25 Liability and Indemnification. Each party (as “**indemnitor**”) agrees to indemnify, defend, and hold harmless the other party (as “**indemnatee**”) from and against any and all claims, losses, liability, costs, or expenses, including reasonable attorney's fees (hereinafter collectively referred to as “**claims**”), arising out of bodily injury of any person, including death or property damage, but only to the extent that such claims which result in vicarious or derivative liability to the indemnitee, are caused by the act, omission, negligence, misconduct, or other fault of the indemnitor, its officer, officials, agents, employees, or volunteers, as established by a court of competent jurisdiction.

9.26 Manager's Power to Consent. City hereby acknowledges and agrees that any unnecessary delay hereunder would adversely affect Hotel Operator and/or the development of the Property, and hereby authorizes and empowers the City Manager to consent to any and all requests of Hotel Operator requiring the consent of the City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendments or modification of this Agreement.

[Signatures appear on following pages]

C2018-06

CITY:

CITY OF TEMPE, an Arizona municipal corporation

By Mark W. Mitchell
 Mark W. Mitchell
 Mayor

ATTEST:

Brigitta M. Kuiper
 Brigitta M. Kuiper
 City Clerk

APPROVED AS TO FORM:

Judith R. Baumann
 Judith R. Baumann
 City Attorney

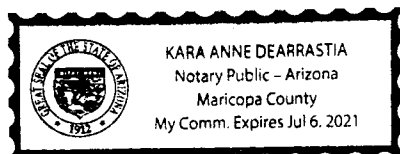
STATE OF ARIZONA)
) ss.
 COUNTY OF MARICOPA)

On this 11th day of January, 2018, before me, the undersigned officer, personally appeared Mark W. Mitchell, who acknowledged himself to be Mayor of THE CITY OF TEMPE, an Arizona municipal corporation, whom I know personally and he, in such capacity, being authorized so to do, executed the foregoing instrument for the purposes therein contained on behalf of that entity.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.

NOTARY SEAL:

Kara Anne DeArastia
 Notary Public



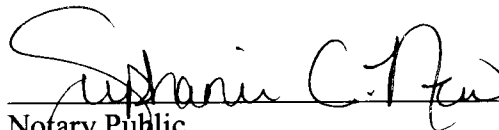
OMNI:


By: Michael G. SmithIts: Vice President

STATE OF Texas)
)ss.
 County of Dallas)

This instrument was acknowledged before me this 11th day of January, 2018
 by Michael G. Smith, as Vice President of Omni, a ~~cor~~
Delaware Limited Liability Company, as on behalf of the _____.

IN WITNESS WHEREOF, I hereunto set my hand and official seal.


 Notary Public

Notary Seal:

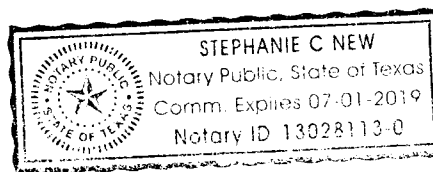


EXHIBIT A TO CC AGREEMENT

PROJECT PARCEL

Wood, Patel & Associates, Inc.
 (480) 834-3300
 www.woodpatel.com

October 30, 2017
 WP# 1645550.01
 Page 1 of 2

PARCEL DESCRIPTION
ASU Blocks 22/27
Parcel B

A portion of Block 22 of Gage Addition to Tempe, Arizona as shown on the Final Plat recorded in Book 3, page 58, Maricopa County Records (M.C.R.), and Amended Plat recorded in Book 8, page 41, M.C.R., lying within Section 22, Township 1 North, Range 4 East, of the Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

COMMENCING at the intersection of Mill Avenue and University Drive (8th Street) as shown on said Final Plat, a 3-inch City of Tempe brass cap in handhole, from which the intersection of University Drive (8th Street) and Myrtle Avenue, a 3-inch City of Tempe brass cap in handhole, bears North 89°48'20" East (basis of bearing), a distance of 561.84 feet;

THENCE along the centerline of said University Drive (8th Street), North 89°48'20" East, a distance of 323.05 feet;

THENCE leaving said centerline, South 00°11'40" East, a distance of 33.00 feet, to the south right-of-way line of said University Drive (8th Street) and the **POINT OF BEGINNING**;

THENCE leaving said south right-of-way line, South 00°32'39" East, a distance of 371.34 feet, to the beginning of a curve;

THENCE southwesterly along said curve to the right, having a radius of 93.50 feet, concave northwest, through a central angle of 62°23'57", a distance of 101.83 feet, to a point of intersection with a non-tangent line;

THENCE South 89°37'34" West, a distance of 167.79 feet, to the east right-of-way line of Mill Avenue;

THENCE along said east right-of-way line, North 00°35'54" West, a distance of 440.03 feet;

THENCE North 44°36'13" East, a distance of 21.14 feet, to said south right-of-way line;

THENCE leaving said east right-of-way line, along said south right-of-way line, North 89°48'20" East, a distance of 203.40 feet, to the **POINT OF BEGINNING**.

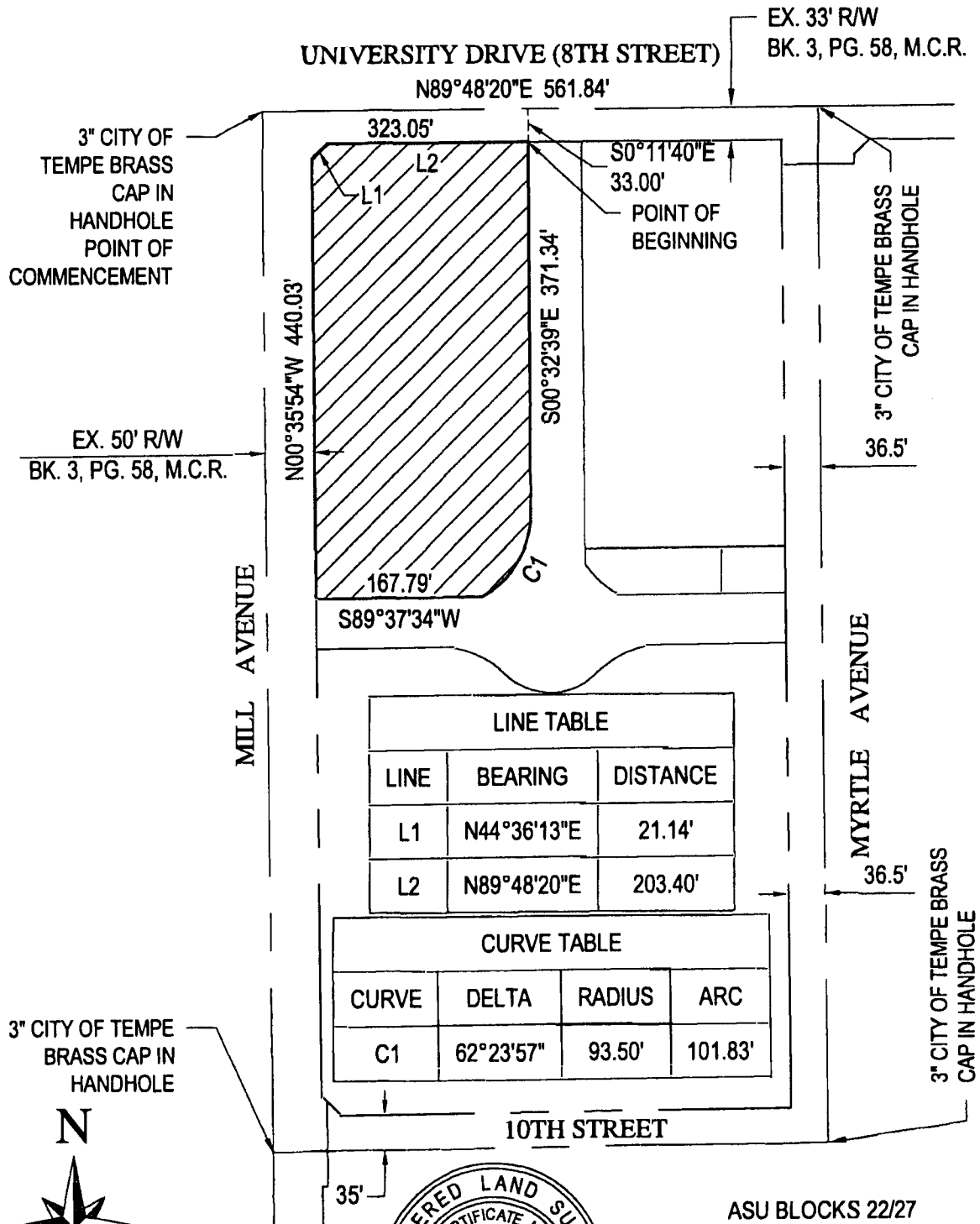
Containing 97,897 square feet or 2.2474 acres, more or less.

Subject to existing rights-of-way and easements.

This parcel description is based on the Final Plat of Gage Addition to Tempe, Arizona, recorded in Book 3, page 58, M.C.R. and Amended Plat recorded in Book 8, page 41, M.C.R., and other client provided information. This parcel description is located within an area surveyed by Wood, Patel and Associates, Inc. during the month of July, 2013. Any monumentation noted in this parcel description is within acceptable tolerance (as defined in Arizona Boundary Survey Minimum Standards dated 02/14/2002) of said positions based on said survey

Y:\WP\Parcel Descriptions\2016 Parcel Descriptions\164555 01 ASU Block 22-27 Parcel B L04 10-30-17.docx



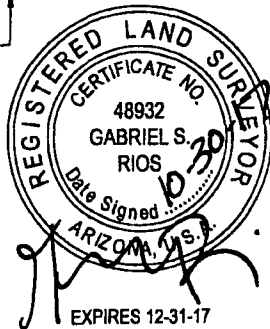


WOOD/PATEL

MISSION: CLIENT SERVICE •

(480) 834-3300

WWW.WOODPATEL.COM



ASU BLOCKS 22/27

PARCEL B

10/30/2017

WP# 164555.01

PAGE 2 OF 2

NOT TO SCALE

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EXHIBIT B TO CC AGREEMENT**CONSTRUCTION COVENANT
AND
OPERATING STANDARD****A. Construction Covenant**

Following the execution of the Hotel Lease, the Lessee shall commence and pursue to completion the Improvements. The Conference Center Improvements will consist of not less than 30,000 net square feet of public floor area containing flexible indoor meeting space, and pre-function area located on the second floor of the Hotel Improvements and designed for the use of corporate and group-related business.

The Conference Center Improvements will include meeting space containing a main ballroom of not less than 15,000 square-feet. If the main ballroom is 15,000 square-feet, then a junior ballroom of 5,000 square-feet will also be required. In any event, the main ballroom will have the capacity to seat a minimum of 1,000 persons in banquet (ten-top round table) configuration, supported by adjacent pre-function space, smaller meeting rooms, plus food service and back-of-the-house facilities consistent with the Operating Standard.

B. Operating Standard

The Hotel Improvements, into which the Conference Center Improvements will be integrated, will be a multi-story structure with a minimum of 330 guest rooms, together with all services and amenities set forth below, necessary to meet the Operating Standard.

Throughout the Term, the Improvements shall be operated at a level consistent with the current operating criteria necessary for a hotel property to receive the American Automobile Association's designation for Four-Diamond hotels as of the Effective Date, as further described below, and in accordance with the Omni Brand Standards. Lessee shall at no time be required to demonstrate receipt or maintenance of such Four-Diamond rating. The parties recognize that hotel operating practices may change during the Term and the parties shall work in good faith to agree to changes to the Operating Standard if the market and business practices dictate such changes.

C. AAA Four-Diamond Rating Information

EXHIBIT C TO CC AGREEMENT**USE RESTRICTION**

When Recorded Return To:
 ASU Box 877405
 Tempe AZ 85287-7405
 Attn: Office of General Counsel

**DECLARATION OF HOTEL AND CONVENTION AND CONFERENCE CENTER
 USE RESTRICTION**

THIS DECLARATION OF HOTEL AND CONVENTION AND CONFERENCE CENTER USE RESTRICTION (the "**Declaration**") is made as of _____, 2018, by ARIZONA BOARD OF REGENTS, a body corporate, for an on behalf of Arizona State University ("**Declarant**").

RECITALS

A. Declarant owns fee title to that certain real property located in the City of Tempe, Arizona ("**City**"), described on Exhibit A attached hereto (as now or hereafter improved, the "**Project Parcel**").

B. Declarant and Omni Tempe, LLC, a Delaware limited liability company ("**Omni**"), entered into that certain Lease dated _____, _____ (the "**Hotel Lease**"), as evidenced by that certain Memorandum of Lease dated and recorded of even date herewith, pursuant to which ASU leased to Omni the Project Parcel, and to develop, operate and/or sublease various improvements thereon.

C. Pursuant to the Hotel Lease Omni agreed to construct certain improvements on the Project Parcel that include without limitation a hotel (the "**Hotel Improvements**") and conference and convention center (the "**Conference Center Improvements**"). The Conference Center Improvements and the Hotel Improvements are collectively referred to in this Agreement as the "**Improvements**". The Conference Center Improvements, the Hotel Improvements and the Project Parcel are collectively referred to in this Agreement as the "**Project**."

D. City and Omni have also entered into that certain Convention and Conference Center Development Agreement dated _____, 2018 (the "**Development Agreement**"), whereby the parties agreed to certain covenants related to the Conference Center Improvements.

E. Pursuant to the Development Agreement, Declarant now desires to restrict the use of the Project Parcel upon the terms and conditions set forth below.

DECLARATION

NOW, THEREFORE, Declarant hereby declares that the use of the Project Parcel shall be subject to the following restrictions, terms and conditions:

1. Commencing on the date the Improvements are completed as evidenced by a temporary or final certificate of occupancy allowing all or substantially all of the Improvements to be used by the public (the “**Completion Date**”) and continuing for a period of sixty (60) years thereafter, the Project Parcel shall only be used as a hotel and convention and conference center and ancillary uses. The restrictions in this Section are collectively referred to herein as the “**Use Restriction**”. Notwithstanding the foregoing, the Use Restrictions shall terminate if the Hotel Lease is terminated for any reason prior to the Completion Date.

2. The Use Restriction shall run with the land and be binding on and enforceable by Declarant, its successors and assigns who control and regulate Arizona State University. The Use Restriction is for the benefit of, and shall be enforceable by, City.

3. The Use Restriction may only be amended, terminated, supplemented, or otherwise modified by a written agreement signed by Declarant and City, or their successors and assigns, which written agreement shall be recorded in the Official Records of Maricopa County, Arizona.

IN WITNESS WHEREOF, Declarant has executed this Declaration of Hotel and Convention and Conference Center Use Restriction on the date first set forth above.

[Signature appears on next page]

SIGNATURE PAGE TO DECLARATION OF HOTEL AND CONVENTION AND
CONFERENCE CENTER USE RESTRICTION

DECLARANT:

ARIZONA BOARD OF REGENTS, a Body
Corporate, for and on behalf of Arizona State
University

By: _____
Name: _____
Its: _____

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

Before me, a Notary Public in and for said county and state, on the ____ day of _____, 201__, personally appeared _____, as _____ of the Arizona Board of Regents, for and on behalf of Arizona State University, who acknowledged the execution of the foregoing document for and on behalf of the University.

Notary Public

[Notary Seal]

EXHIBIT A OF EXHIBIT C

PROJECT PARCEL LEGAL DESCRIPTION

Wood, Patel & Associates, Inc.
 (480) 834-3300
 www.woodpatel.com

October 30, 2017
 WP# 1645550.01
 Page 1 of 2

PARCEL DESCRIPTION
ASU Blocks 22/27
Parcel B

A portion of Block 22 of Gage Addition to Tempe, Arizona as shown on the Final Plat recorded in Book 3, page 58, Maricopa County Records (M.C.R.), and Amended Plat recorded in Book 8, page 41, M.C.R., lying within Section 22, Township 1 North, Range 4 East, of the Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

COMMENCING at the intersection of Mill Avenue and University Drive (8th Street) as shown on said Final Plat, a 3-inch City of Tempe brass cap in handhole, from which the intersection of University Drive (8th Street) and Myrtle Avenue, a 3-inch City of Tempe brass cap in handhole, bears North 89°48'20" East (basis of bearing), a distance of 561.84 feet;

THENCE along the centerline of said University Drive (8th Street), North 89°48'20" East, a distance of 323.05 feet;

THENCE leaving said centerline, South 00°11'40" East, a distance of 33.00 feet, to the south right-of-way line of said University Drive (8th Street) and the **POINT OF BEGINNING**;

THENCE leaving said south right-of-way line, South 00°32'39" East, a distance of 371.34 feet, to the beginning of a curve;

THENCE southwesterly along said curve to the right, having a radius of 93.50 feet, concave northwest, through a central angle of 62°23'57", a distance of 101.83 feet, to a point of intersection with a non-tangent line;

THENCE South 89°37'34" West, a distance of 167.79 feet, to the east right-of-way line of Mill Avenue;

THENCE along said east right-of-way line, North 00°35'54" West, a distance of 440.03 feet;

THENCE North 44°36'13" East, a distance of 21.14 feet, to said south right-of-way line;

THENCE leaving said east right-of-way line, along said south right-of-way line, North 89°48'20" East, a distance of 203.40 feet, to the **POINT OF BEGINNING**.

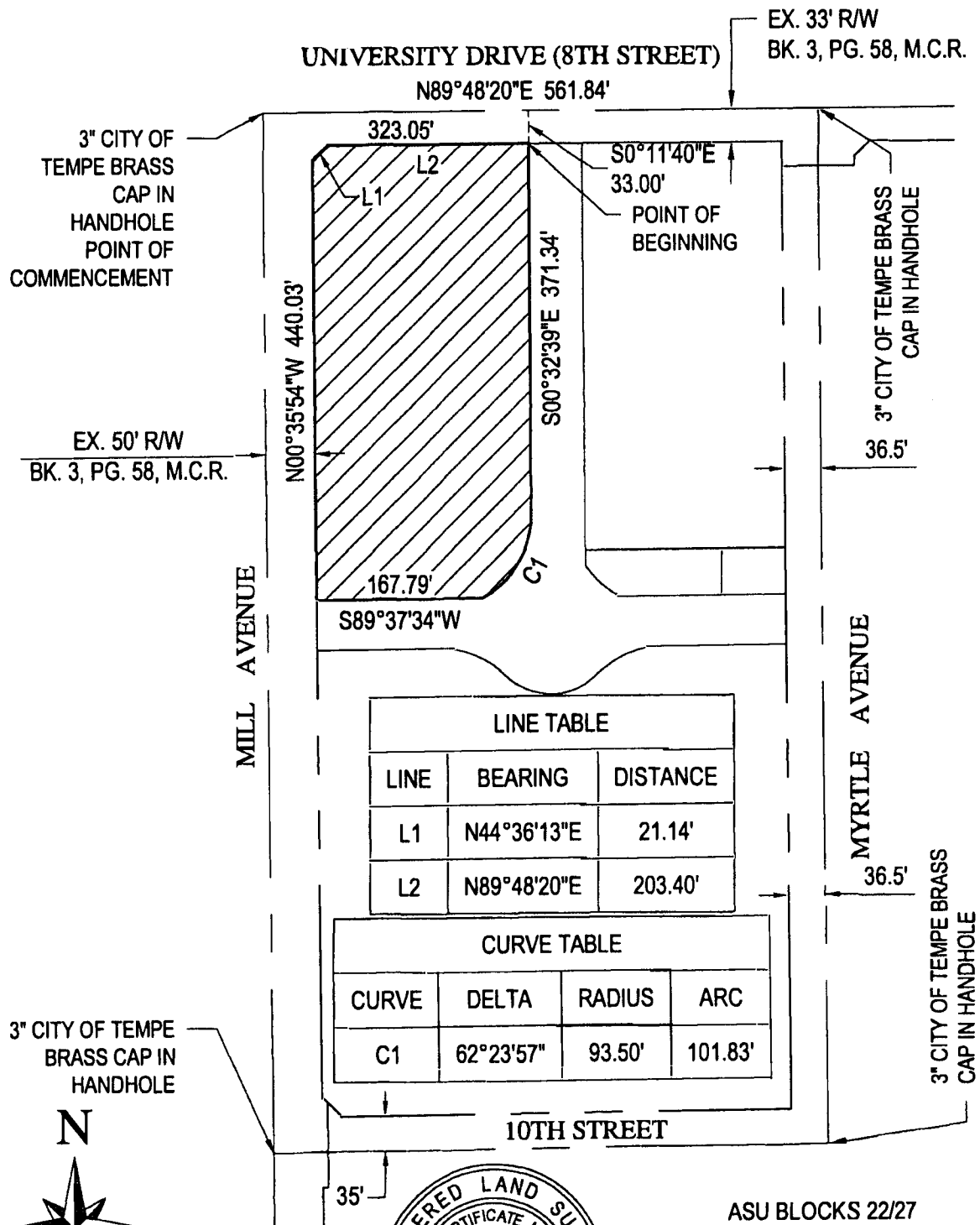
Containing 97,897 square feet or 2.2474 acres, more or less.

Subject to existing rights-of-way and easements.

This parcel description is based on the Final Plat of Gage Addition to Tempe, Arizona, recorded in Book 3, page 58, M.C.R. and Amended Plat recorded in Book 8, page 41, M.C.R., and other client provided information. This parcel description is located within an area surveyed by Wood, Patel and Associates, Inc. during the month of July, 2013. Any monumentation noted in this parcel description is within acceptable tolerance (as defined in Arizona Boundary Survey Minimum Standards dated 02/14/2002) of said positions based on said survey

Y:\WP\Parcel Descriptions\2016 Parcel Descriptions\164555 01 ASU Block 22-27 Parcel B L04 10-30-17.docx





WOOD/PATEL

MISSION: CLIENT SERVICE •

(480) 834-3300

WWW.WOODPATEL.COM



ASU BLOCKS 22/27

PARCEL B

10/30/2017

WP# 164555.01

PAGE 2 OF 2

NOT TO SCALE

Z:\2016\164555\Survey\Legal\4555-L04.dwg

EXHIBIT D TO CC AGREEMENT**STREETCAR AGREEMENT****WHEN RECORDED, RETURN TO:**

City of Tempe Basket

STREETCAR DEVELOPMENT AGREEMENT

[c2017-XXX]

THIS STREETCAR DEVELOPMENT AGREEMENT ("Agreement") is made as of the _____ day of January, 2018 and shall become effective as of the execution of the Ground Lease (as defined below) (the "**Effective Date**"), between the CITY OF TEMPE, an Arizona municipal corporation ("**City**"), and Omni Tempe, LLC, a Delaware limited liability company ("**Ground Lessee**"). City and Ground Lessee may be referred to herein, collectively, as the "**Parties**" and, individually, as a "**Party**", as the context may require.

RECITALS

A. The Ground Lessee is anticipated to become the tenant under a lease, by and between the Arizona Board of Regents, a body corporate, for and on behalf of Arizona State University (the "**Ground Lessor**"), as Landlord, and Ground Lessee (the "**Ground Lease**"), pursuant to which Ground Lessee will lease that real property legally described in *Exhibit "A"* attached hereto and incorporated herein by this reference (the "**Property**") from Ground Lessor for a lease term of at least sixty (60) years.

B. Valley Metro Rail, Inc., a nonprofit corporation duly organized and existing under the laws of the State of Arizona ("**Valley Metro**"), in conjunction with City and the Maricopa Association of Governments, is proceeding with the planning, design, financing and construction of a streetcar project, as generally described in *Exhibit B*.

C. City and Ground Lessee hereby acknowledge and agree that significant benefits will accrue from implementation of the Tempe Streetcar Project including, without limitation, for the City, the potential for increased tax revenues and opportunities for employment within the City and otherwise improving or enhancing the economic welfare of the inhabitants of the City, and, for the Property, facilitating the Property's development, as contemplated in the Ground Lease and certain other agreements and approvals in respect of the Property, together with the potential for increased property values.

D. This Agreement is a development agreement within the meaning of A.R.S. §9-500.05 and shall be construed as such.

AGREEMENT

NOW THEREFORE, in consideration of the above premises, the promises contained in this Agreement and for good and valuable consideration, the receipt and sufficiency of which the Parties acknowledge, the Parties hereto agree as follows:

1. DEFINITIONS

In addition to words and terms defined elsewhere herein, the following terms shall have the meanings set forth below whenever used in this Agreement, except where the context clearly indicates otherwise:

1.1. "City" means the City of Tempe, an Arizona municipal corporation, and any successor public body or entity.

1.2. "City Contribution as an Owner of Real Property" means as defined in Section 3.2.

1.3. "City Contribution to Tempe Streetcar Project" means as defined in Section 3.1.

1.4. "City Property" means as defined in Section 3.2.

1.5. "Condition Precedent" means as defined in Section 3.3.1.

1.6. "Contribution" means as defined in Section 3.3.

1.7. "Contribution Construction Account" means as defined in Section 3.4

1.8. "Contribution Formula" means as defined in Section 3.2.

1.9. "Default Interest Rate" means as defined in Section 3.3.3.

1.10. "Effective Date" means as defined in the preamble to this Agreement.

1.11. "Ground Lessee" means as defined in the preamble to this Agreement and its successors and assigns.

1.12 "Ground Lessor" means as defined in Recital A and its successors and assigns.

1.13 "Owners" means as defined in Section 3.1.

1.14. "Parties" means as defined in the preamble to this Agreement.

1.15. "Party" means as defined in the preamble to this Agreement.

1.16. "Tempe Streetcar Project" means the planning, financing, design and construction of the streetcar project described in Recital B and *Exhibit B*.

1.17. "Valley Metro" means Valley Metro Rail, Inc., a nonprofit corporation duly organized and existing under the laws of the State of Arizona as described in Recital B.

2. GENERAL TERMS

2.1. Incorporation of Recitals. The Recitals are true and correct and are incorporated herein by reference.

2.2. Duration of Development Agreement; Termination by Ground Lessee. The term of this Agreement (the "**Term**") shall commence on the Effective Date and continue until the date the Contribution (as hereinafter defined) is paid in full or, if applicable, such earlier date on which this Agreement terminates as hereinafter provided. Notwithstanding anything contained in the foregoing or elsewhere in this Agreement to the contrary, in the event that, prior to the City's commencement of construction of the Tempe Streetcar Project, the Ground Lessee, for any reason, elects not to proceed with the development of the Property as contemplated pursuant to the Ground Lease, the Ground Lessee shall have the right to terminate this Agreement and its obligations hereunder for payment of the Contribution attributable to Ground Lessee by providing written notice of termination to the City, whereupon this Agreement shall terminate and be of no further force or effect and the parties shall execute and cause to be recorded such documents or instruments as may be necessary to reflect such termination.

3. GROUND LESSEE CONTRIBUTION

3.1. City Contribution to Tempe Streetcar Project. City anticipates that the construction phase of the Tempe Streetcar Project will commence in 2018 and consist of 3.0 miles of modern streetcar line, with the route and stops to be as generally described in *Exhibit B*. To City's knowledge, as of the Effective Date, there is no proposed or pending change in the route or proposed or pending change to or deletion of any stop as reflected in *Exhibit B*. The funding required to construct the Tempe Streetcar Project is approximately one hundred eighty-six million, one hundred thousand dollars (\$186,100,000.00). The plan of finance for the Tempe Streetcar Project is anticipated to require payment by City of approximately thirteen million dollars (\$13,000,000.00) plus financing costs not to exceed five percent (5%) per annum during the Term (the "**City Contribution to Tempe Streetcar Project**"). City shall secure and advance the monies necessary to pay the City Contribution to Tempe Streetcar Project, initially, subject to reimbursement by certain owners of the fee title and/or leasehold interests in various parcels of real property located along or in the vicinity of the planned route for the Tempe Streetcar Project, including the Ground Lessee (collectively, the "**Owners**"), who have agreed (or shall agree in the future) to make contributions to offset the City Contribution to Tempe Streetcar Project. Without limitation, City shall use commercially reasonable efforts to secure further contributions from Owners who develop projects located along or in the vicinity of the planned route for the Tempe Streetcar Project following the Effective Date.

3.2. Contribution Formula. The annual contribution for each participating Owner's parcel shall be an amount equal to the product of \$0.10 and the gross square footage of the

permits or certificates of occupancy (as applicable) have been issued by City, payable in equal annual installments over a twenty (20) year period ("**Contribution Formula**"). Additionally, City shall annually pay its proportionate share, pursuant to the Contribution Formula ("**City Contribution as an Owner of Real Property**"), for the real property owned by City located along or in the vicinity of the Tempe Streetcar Project route excluding the real property owned by City that is leased to other parties ("**City Property**"). City represents that as of the Effective Date of this Agreement the City Property is approximately 187,440 square feet, and that such square footage is not subject to adjustment regardless of whether portions of the City Property are hereafter leased or conveyed to other parties. The City Contribution as an Owner of Real Property is included within the City Contribution to Tempe Streetcar Project.

3.3. Ground Lessee Contribution. City and Ground Lessee acknowledge and agree that (a) the gross square footage of the enclosed areas of the building(s) intended for occupancy is expected to be as of the Effective Date, as determined pursuant to Section 3.2, 265,000 square feet, which amount shall be adjusted as necessary when building permits or certificates of occupancy (as applicable) have been issued, and (b) accordingly, the total annual contribution amount attributable to Ground Lessee pursuant to the Contribution Formula is twenty six thousand five hundred dollars (\$26,500), which amount shall be adjusted as necessary when building permits or certificates of occupancy (as applicable) have been issued, payable in twenty (20) equal annual installments, totaling five hundred and thirty thousand dollars (\$530,000), which amount shall be adjusted as necessary when building permits or certificates of occupancy (as applicable) have been issued (the "**Contribution**").

3.3.1. Payment Schedule. City is obligated to, and it shall be a condition precedent to the obligation of Ground Lessee to pay the Contribution that City shall have made payments to Valley Metro equal to seventy five percent (75%) of the City Contribution to Tempe Streetcar Project (collectively, the "**Condition Precedent**") with the City thereafter remaining obligated to fund the balance of the City Contribution to Tempe Streetcar Project on or before January 31, 2020 (the "**Funding Deadline**"). Upon written notice by City to Ground Lessee, on or before the Funding Deadline, that City has satisfied the Condition Precedent, as provided for in the preceding sentence of this Section 3.3.1, and provided evidence of the same, then and in such event Ground Lessee shall pay the initial annual installment of the Contribution on or before the date that is twenty four (24) months after the final certificate of occupancy is issued for all of the residential portions of the improvements to be constructed on the Property by Ground Lessee (the "**Payment Date**"). Thereafter Ground Lessee shall pay each subsequent annual installment on or before the Payment Date of each succeeding calendar year until the Contribution is paid in full; provided, however, that if City fails to timely pay the City Contribution as and when due pursuant to the first sentence of this Section 3.3.1, Ground Lessee shall have no obligation to pay any installment(s) following the failure until City has cured the same. If the Condition Precedent has not been satisfied and the written notice by City to Ground Lessee provided on or before the Funding Deadline, this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Ground Lessee.

3.3.2. Default Interest. Any installment not timely paid hereunder shall bear interest, from the date of delinquency until paid in full, at a rate equal to the consensus prime rate of interest, as published in the Wall Street Journal from time to time (or, in the event such consensus prime rate is no longer published by the Wall Street Journal, a published consensus

prime rate or equivalent measure selected by City in its reasonable discretion), plus five percent (5%) ("**Default Interest Rate**").

3.3.3. Prepayment. Notwithstanding anything herein to the contrary, at any time, Ground Lessee may pay the unpaid balance of the Contribution amount, in full, to City, whereupon this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Ground Lessee; provided, however, any reimbursement obligation to Ground Lessee thereafter arising pursuant to Section 3.4 hereof shall survive any such termination.

3.4. Contribution Construction Account. City shall cause all payments of the Contribution to be deposited in a separate account established for such purpose (the "**Contribution Construction Account**").

3.4.1. Administration of Contribution Construction Account. All amounts deposited in the Contribution Construction Account and any earnings thereon shall be used exclusively to reimburse City for monies previously disbursed by City to pay the City Contribution to Tempe Streetcar Project, except as hereinafter provided:

3.4.1.1. Tempe Streetcar Project Discontinued. If construction of the Tempe Streetcar Project has not commenced on or before the Funding Deadline, City shall promptly notify Ground Lessee, in which case Ground Lessee shall have no further payment obligations hereunder, and, any portion of the Contribution previously paid by Ground Lessee shall be reimbursed within sixty (60) days, whereupon this Agreement shall automatically terminate and be of no further force or effect, without further action or notice by or on the part of City or Ground Lessee. For purposes of this Section, construction of the Tempe Streetcar Project shall be deemed to have commenced when (a) construction plans have been approved by all entities having jurisdiction over the design of the Tempe Streetcar Project, (b) a contract has been executed with the party who will construct the Tempe Streetcar Project, and (c) meaningful physical construction on the Tempe Streetcar Project has commenced.

3.4.1.2. Funding Surplus.

(a) If, upon completion of the construction of the Tempe Streetcar Project, it is determined that the City Contribution to Tempe Streetcar Project is less than the sum total of the Owners' aggregate annual contribution obligations and the City Contribution as an Owner of Real Property ("**Funding Surplus**"), each Owner (including Ground Lessee) shall receive a credit against such Owners' outstanding contribution obligations in an amount equal to such difference, which credit shall be allocated among the Owners in proportion to their respective contribution obligations, and applied against the last remaining installment and, if applicable, the next prior installment or installments payable by each such Owner until such credit is exhausted; provided, if any Owner has paid its contribution in full or otherwise receives a credit which is in excess of the aggregate amount of the remaining unpaid contribution of such Owner, such excess shall be reimbursed to such Owner (including Ground Lessee) from any excess funds then on hand or as and when received by City, in the future, upon payment of outstanding installments by other Owners (in excess of their respective credit amounts).

(b) If the Tempe Streetcar Project is discontinued prior to completion of the construction thereof and a Funding Surplus exists, then and in such event, each Owner (including Ground Lessee) shall receive a credit against such Owners' outstanding contribution obligations in an amount equal to such Funding Surplus, which credit shall be allocated among the Owners in proportion to their respective contribution obligations, and applied against the last remaining installment and, if applicable, the next prior installment or installments payable by each such Owner until such credit is exhausted; provided, if any Owner has paid its contribution in full or is otherwise entitled to receive a credit which is in excess of the aggregate amount of the remaining unpaid contribution of such Owner, such excess shall be reimbursed to such Owner (including Ground Lessee) from any excess funds then on hand or as and when received by City in the future.

(c) For the avoidance of doubt, a Funding Surplus triggering City's obligation to make the reimbursement payments required pursuant to this Section 3.4.1.2 would only occur if and when all Owners' contributions that have and/or should have been made (including the City Contribution as an Owner of Real Property) are greater than the City Contribution to Tempe Streetcar Project.

3.4.1.3. **City Payment and Collection Obligations.** City is responsible for payment of the City Contribution to Tempe Streetcar Project if any of the Owners do not make their payments. City will exercise commercially reasonable best efforts to obtain payments from all Owners who now or hereafter are parties to agreements with City in respect of the Tempe Streetcar Project and to enter into such agreements, on substantially the same terms contained in this Agreement, with current and future commercial Owners, as and when applicable. Without limitation of the foregoing, City shall not enter into any agreement in respect of the Tempe Streetcar Project on terms which are more favorable to another Owner, in any material respect, without first offering in writing and with reasonable notice the opportunity to Ground Lessee to amend this Agreement to include such terms and, in the event City, now or hereafter, enters into an agreement with an Owner on terms which are more favorable to such Owner in any material respect than the terms of this Agreement without first offering such opportunity to Ground Lessee, then, at the election of Ground Lessee, this Agreement shall be deemed amended in applicable part to extend to Ground Lessee the full benefit of such terms (including, as applicable, Ground Lessee shall be entitled to a credit or other adjustment to account for and reconcile any prior payment or performance by Ground Lessee pursuant to less favorable terms).

4. DEFAULT; REMEDIES

4.1. Default. It shall be a default hereunder if a Party fails to perform any of its obligations hereunder and: (a) if such failure to perform is the failure to pay any amount payable hereunder as and when due, such failure continues for a period of ten (10) business days after written notice from the non-defaulting Party, provided, in the event there have been two or more prior failures to timely pay, immediately upon such failure to pay, or (b) if such failure to perform is the failure to perform a non-monetary obligation, such failure continues for a period of thirty (30) days after written notice from the non-defaulting Party specifying in reasonable detail the nature of the failure, provided, if the nature of the default is such that it cannot reasonably be cured within the thirty-day period, no default shall be deemed to exist if the

defaulting Party commences a cure within that thirty-day period and diligently and expeditiously pursues such cure to completion within ninety (90) days.

4.2. Ground Lessee Defaults. In addition to the foregoing, it shall be a default hereunder if: (a) Ground Lessee makes an assignment for the benefit of creditors; (b) a receiver takes possession of the Property; or (c) the dissolution or termination of existence of Ground Lessee occurs unless its successor by transfer or operation of law is continuing the business of operating the Property.

4.3. Remedies. If a Party is in default under this Agreement, the non-defaulting Party shall have the right to pursue all legal and equitable remedies which such Party may have at law or in equity, including, without limitation, the right to seek specific performance and, in the case of City, to collect interest at the Default Interest Rate (if applicable); provided, in no event shall any Party be liable for incidental, consequential, punitive, special, speculative or similar damages or any monetary damages other than actual damages (and each Party hereby waives the right to pursue an award of damages other than actual damages). Notwithstanding anything contained in the foregoing or elsewhere in this Agreement to the contrary, the City acknowledges and agrees that: (a) Ground Lessee, not Ground Lessor, shall be solely responsible for payment of all obligations arising under this Agreement, including but not limited to, payment of the Contribution; (b) no lien or assessment arising out of such obligations or the Contribution shall attach to the Property; (c) the provisions of this Agreement are not covenants running with or binding on the Property; and (d) the City's recourse for any breach or default by the Ground Lessee under the terms and conditions of this Agreement shall be solely against the Ground Lessee, not against the Property or Ground Lessor.

5. GENERAL PROVISIONS

5.1. No Partnership. Nothing in this Agreement is intended or shall be construed to create a joint venture, partnership, agency, or fiduciary relationship between City and Ground Lessee.

5.2. No Third Party Beneficiary. This Agreement is intended solely for the benefit of City and Ground Lessee and their respective successors and assigns, and no other party shall have any rights or interest in this Agreement or, except Valley Metro, the Contribution Construction Account.

5.3. No Personal Liability of Ground Lessee. No former, current or future member, shareholder, director, partner, manager, officer or employee of Ground Lessee shall be personally liable to City, or any successor or assignee, (a) in the event of any default or breach by the Ground Lessee, (b) for any amount which may become due to City or its successor or assign, or (c) pursuant to any obligation of Ground Lessee under the terms of this Agreement.

5.4. No Personal Liability of City. No former, current or future member, official or employee of City shall be personally liable to Ground Lessee, or any successor or assignee, (a) in the event of any default or breach by City, (b) for any amount which may become due to the

Ground Lessee or its successor or assign, or (c) pursuant to any obligation of City under the terms of this Agreement.

5.5. Conflict of Interest. Pursuant to Arizona law, rules and regulations, no member, official or employee of City shall have any personal interest, direct or indirect, in this Agreement, nor shall any such member, official or employee participate in any decision relating to this Agreement which affects his or her personal interest or the interest of any corporation, partnership or association in which he or she is, directly or indirectly, interested. This Agreement is subject to A.R.S. § 38-511.

5.6. Notice. All notices which shall or may be given pursuant to this Agreement shall be in writing and transmitted by registered or certified mail, return receipt requested, addressed as follows:

To Ground Lessee: c/o Omni Hotels
Attn: Mike Smith
4001 Maple Avenue, Suite 600
Dallas, Texas 75219

With a copy to: c/o Omni Hotels
Attn: Paul Jorge
4001 Maple Avenue, Suite 600
Dallas, Texas 75219

To City: City Manager
City of Tempe
31 East Fifth Street
Tempe, Arizona 85281

With a copy to: City Attorney
City of Tempe
21 East Sixth Street, Suite 201
Tempe, Arizona 85281

Either Party may designate additional notice parties (e.g., owners association) or any other address for this purpose by written notice to the other Party in the manner described herein.

5.6 Governing Law. This Agreement shall be governed by and construed in accordance with the internal substantive laws of the State of Arizona (without reference to conflict of laws principles). This Agreement has been made and entered into in Maricopa County, Arizona.

5.7 Successors and Assigns. Upon any conveyance of Ground Lessee's leasehold interest in the Property, the succeeding Tenant under the Ground Lease shall be deemed to have assumed, and shall be responsible for paying, all accrued and unaccrued liabilities and obligations of Ground Lessee under this Agreement (or in the event of the conveyance of a

portion of the Property, the prorata share thereof based on the square footage of the improvements conveyed to the transferee). The transferee shall provide City with the name, address and designated representative of such successor transferee. Upon any such transfer, the transferor shall be released from all accrued and unaccrued obligations or liabilities arising under this Agreement with respect to the portion of the Property conveyed. This Agreement shall be binding upon and accrue to the benefit of the Parties and Ground Lessee's successors and assigns.

5.8 Waiver. No waiver by either Party of any breach of any of the terms, covenants or conditions of this Agreement shall be construed or held to be a waiver of any succeeding or preceding breach of the same for any other term, covenant or condition herein contained.

5.9 Severability. In the event that any phrase, clause, sentence, paragraph, section, article or other portion of this Agreement shall become illegal, null or void or against public policy, for any reason, or shall be held by any court of competent jurisdiction to be illegal, null or void or against public policy, the remaining portions of this Agreement shall not be affected thereby and shall remain in full force and effect to the fullest extent permitted by law, provided that the overall intent of the parties is not materially vitiated by such severability.

5.10 Entire Agreement. This Agreement constitutes the entire agreement between the Parties hereto pertaining to the subject matter hereof and all prior and contemporaneous agreements, representations, negotiations and understandings of the parties hereto, oral or written, are hereby superseded and merged herein.

5.11 Further Instruments. Each of the Parties hereto shall execute and deliver such documents or instruments as the other Party shall reasonably request in order to consummate the transactions contemplated by this Agreement.

5.12 Attorneys' Fees. In the event of any actual litigation between the Parties in connection with this Agreement, the Party prevailing in such action shall be entitled to recover from the other Party all of its costs and fees, including reasonable attorneys' fees, which shall be determined by the court and not by the jury and be included in the decision, order or judgment, as applicable. If both Parties are awarded relief, then the award for attorneys' fees shall be apportioned in the discretion of the court.

5.13 Schedules and Exhibits. All schedules and exhibits attached hereto are incorporated herein by this reference as though fully set forth herein.

5.14 Counterparts. This Agreement may be executed in counterparts, each of which shall be an original and all of which counterparts taken together shall constitute one and the same agreement.

5.15 Recordation of Agreement. This Agreement shall be recorded in the Official Records of Maricopa County, Arizona, within ten (10) days after execution of this Agreement by City. At the request of Ground Lessee, City shall provide a recordable release or termination of

this Agreement upon the expiration of the Term or prior termination of the Agreement in form reasonably acceptable to Ground Lessee.

5.16 City Manager's Power to Consent. City authorizes and empowers the City Manager to consent to any and all requests of the Ground Lessee requiring the consent of City hereunder without further action of the City Council, except for any actions requiring City Council approval as a matter of law, including, without limitation, any amendment or modification of this Agreement.

5.17 Estoppel Certificate. Within thirty (30) days after receipt of written request therefor from the other Party, City or Ground Lessee, as the case may be, shall execute, acknowledge and deliver to the requesting Party and/or its lender a statement certifying that this Agreement is unmodified and in full force and effect (or, if modified, stating the nature of such modification and certifying that this Agreement, as so modified, is in full force and effect), and acknowledging that there are not, to the certifying Party's knowledge, any uncured defaults on the part of the other Party hereunder, or specifying such defaults if any are claimed. Any such statement may be conclusively relied on by any auditor of either Party, or by any prospective purchaser of the Property.

[NO FURTHER TEXT ON THIS PAGE]

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed on or as of the day and year first above written.

ATTEST:

"CITY"

THE CITY OF TEMPE, an Arizona municipal corporation

Brigitta M. Kuiper, City Clerk

APPROVED AS TO FORM:

By _____
Mark W. Mitchell, Mayor

Judith R. Baumann, City Attorney

STATE OF ARIZONA)
)
COUNTY OF MARICOPA) ss

The foregoing instrument was acknowledged before me this ____ day of _____, 201_, by _____, the Mayor of the City of Tempe.

Notary Public

My Commission Expires:

"GROUND LESSEE"

Omni Tempe, LLC, a Delaware limited liability company

By: _____
 Name _____
 Title _____

STATE OF DELEWARE)
)
 COUNTY OF _____) ss

The foregoing instrument was acknowledged before me this _____ day of _____, 201_ by _____, _____ of Omni Tempe, LLC, a Delaware limited liability company.

 Notary Public

My Commission Expires:

LIST OF EXHIBITS AND SCHEDULES

- Exhibit "A" - Legal Description of Property
- Exhibit "B" - Description of Tempe Streetcar Project

EXHIBIT A

LEGAL DESCRIPTION OF PROPERTY

Wood, Patel & Associates, Inc.
 (480) 834-3300
 www.woodpatel.com

October 30, 2017
 WP# 1645550.01
 Page 1 of 2

PARCEL DESCRIPTION
ASU Blocks 22/27
Parcel B

A portion of Block 22 of Gage Addition to Tempe, Arizona as shown on the Final Plat recorded in Book 3, page 58, Maricopa County Records (M.C.R.), and Amended Plat recorded in Book 8, page 41, M.C.R., lying within Section 22, Township 1 North, Range 4 East, of the Gila and Salt River Meridian, Maricopa County, Arizona, more particularly described as follows:

COMMENCING at the intersection of Mill Avenue and University Drive (8th Street) as shown on said Final Plat, a 3-inch City of Tempe brass cap in handhole, from which the intersection of University Drive (8th Street) and Myrtle Avenue, a 3-inch City of Tempe brass cap in handhole, bears North 89°48'20" East (basis of bearing), a distance of 561.84 feet;

THENCE along the centerline of said University Drive (8th Street), North 89°48'20" East, a distance of 323.05 feet;

THENCE leaving said centerline, South 00°11'40" East, a distance of 33.00 feet, to the south right-of-way line of said University Drive (8th Street) and the **POINT OF BEGINNING**;

THENCE leaving said south right-of-way line, South 00°32'39" East, a distance of 371.34 feet, to the beginning of a curve;

THENCE southwesterly along said curve to the right, having a radius of 93.50 feet, concave northwest, through a central angle of 62°23'57", a distance of 101.83 feet, to a point of intersection with a non-tangent line;

THENCE South 89°37'34" West, a distance of 167.79 feet, to the east right-of-way line of Mill Avenue;

THENCE along said east right-of-way line, North 00°35'54" West, a distance of 440.03 feet;

THENCE North 44°36'13" East, a distance of 21.14 feet, to said south right-of-way line;

THENCE leaving said east right-of-way line, along said south right-of-way line, North 89°48'20" East, a distance of 203.40 feet, to the **POINT OF BEGINNING**.

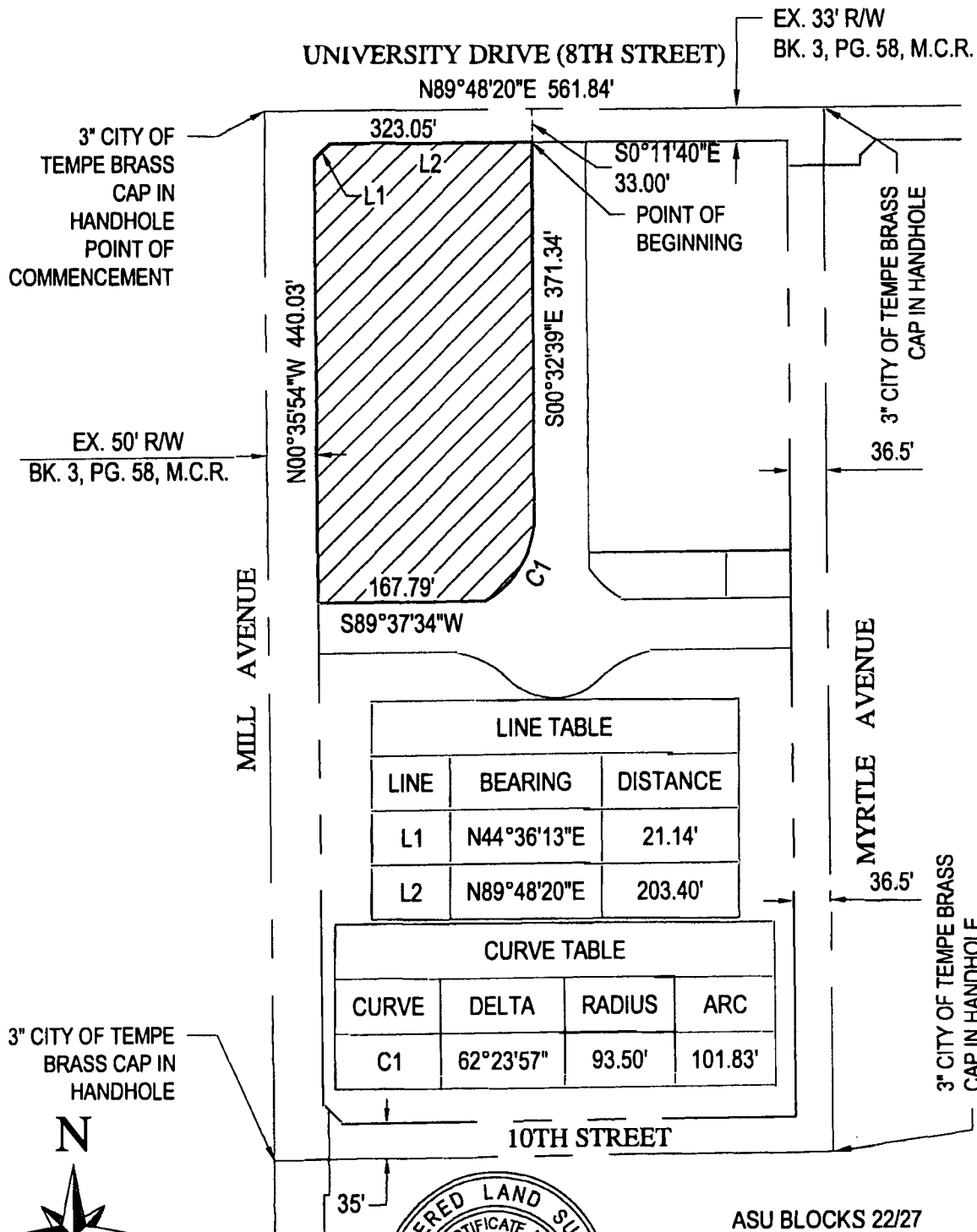
Containing 97,897 square feet or 2.2474 acres, more or less.

Subject to existing rights-of-way and easements.

This parcel description is based on the Final Plat of Gage Addition to Tempe, Arizona, recorded in Book 3, page 58, M.C.R. and Amended Plat recorded in Book 8, page 41, M.C.R., and other client provided information. This parcel description is located within an area surveyed by Wood, Patel and Associates, Inc. during the month of July, 2013. Any monumentation noted in this parcel description is within acceptable tolerance (as defined in Arizona Boundary Survey Minimum Standards dated 02/14/2002) of said positions based on said survey

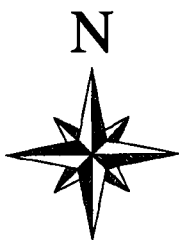
Y:\WP\Parcel Descriptions\2016 Parcel Descriptions\164555 01 ASU Block 22-27 Parcel B L04 10-30-17.docx





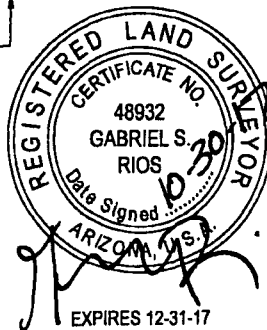
LINE TABLE		
LINE	BEARING	DISTANCE
L1	N44°36'13"E	21.14'
L2	N89°48'20"E	203.40'

CURVE TABLE			
CURVE	DELTA	RADIUS	ARC
C1	62°23'57"	93.50'	101.83'



WOOD/PATEL

MISSION: CLIENT SERVICE
(480) 834-3300
WWW.WOODPATEL.COM



ASU BLOCKS 22/27
PARCEL B
10/30/2017
WP# 164555.01
PAGE 2 OF 2
NOT TO SCALE

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Exhibit B, entitled "Description of Tempe Streetcar Project", has been removed for recording. A true and correct copy is on file with, and can be obtained from, the Tempe City Clerk, 31 East Fifth Street, Tempe, AZ 85281.